Supreme Court, U.S.
FILED
04 103 JUL 19 2004
OFFICE OF THE CLERK

No. 04- ____

In the Supreme Court of the United States

GREGORY D. STUMBO, et al.,
Petitioners,

v.

HOBART WARD ANDERSON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

GREGORY D. STUMBO
ATTORNEY GENERAL OF KENTUCKY
Counsel of Record
D. BRENT IRVIN
ASSISTANT ATTORNEY GENERAL
JANET GRAHAM
ASSISTANT DEPUTY ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
700 CAPITOL AVENUE
SUITE 118 CAPITOL BUILDING
FRANKFORT, KY 40601-3449
(502) 696-5663

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTIONS PRESENTED

I. Kentucky law prohibits "electioneering" within 500 feet of a polling place on Election Day. The question presented is:

Whether the Sixth Circuit erred in (a) striking down the 500-foot radius as too large, in conflict with the Fifth Circuit, or (b) holding that "electioneering" must be limited to "express advocacy," a test this Court had described one month earlier as "functionally meaningless," *see McConnell v. FEC*, 124 S. Ct. 619 (2003).

II. Gubernatorial candidates in Kentucky may voluntarily accept a spending cap in exchange for matching funds. The voluntary cap is lifted if a nonparticipating candidate exceeds the cap. The question presented is:

Whether the Sixth Circuit erred in holding such "trigger" provisions unconstitutional, in conflict with the First and Eighth Circuits, and an earlier panel of the Sixth Circuit.

III. Whether the Sixth Circuit erred in holding, in conflict with the Supreme Courts of Alaska and Florida, that Kentucky cannot prevent gubernatorial candidates from lending unlimited sums to their own campaigns and then, after being elected Governor, recouping the loans by soliciting contributions from persons seeking no-bid contracts from the Commonwealth.

IV. Whether Kentucky can prevent vote fraud and the circumvention of its disclosure requirements by requiring that contributions to candidates be made in traceable form, such as by check, rather than in cash.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court whose judgment is under review are: (1) Hobart Ward Anderson and Hoby for the Commonwealth; Plaintiffs-Appellants; (2) Lloyd E. Spear, in his official capacity as Commonwealth Attorney for Greenup County, Kentucky and as representative of Commonwealth Attorneys in the Commonwealth of Kentucky; Defendant; (3) Michael C. Wilson, in his official capacity as County Attorney for Greenup County, Kentucky and as a representative of the class of County Attorneys in the Commonwealth of Kentucky; (4) A. Benjamin Chandler, III, in his official capacity, was Attorney General for the Commonwealth of Kentucky and has been succeeded by Gregory D. Stumbo; (5) Donald L. Cox, in his official capacity, was Chair of the Kentucky Registry of Election Finance and has been succeeded by John Rogers; (6) Judith Grisman Clabes, in her official capacity was a Member of the Kentucky Registry of Election Finance and has been succeeded by Susan Cooper; (7) Scott C. Cox, in his official capacity was a Member of the Kentucky Registry of Election Finance and has been succeeded by Jeffrey Tipton; (8) David Shawn Samford, in his official capacity as Member of the Kentucky Registry of Election Finance; (9) Robert E. Sanders, in his official capacity was a Member of the Kentucky Registry of Election Finance and has been succeeded by John Fossett; (10) John L. Smith, in his official capacity as Member of the Kentucky Registry of Election Finance; (11) John Y. Brown, III, in his official capacity, was Chair of the Kentucky State Board of Elections, and has been succeeded by Trey Grayson; (12) Janie Bruce, in her official capacity as a Member of the State Board of Elections; (13) Charles W. Buchannan, in his official capacity as a Member of the Kentucky State Board of Elections; (14) John Caudill, in his official capacity as a Member of the Kentucky State

Board of Elections; (15) John Chowning, in his official capacity was a Member of the Kentucky State Board of Elections and has been succeeded by William Kirkland; (16) Dave Disponett, in his official capacity as a Member of the Kentucky State Board of Elections; (17) Clifford Duvall, in his official capacity as Commonwealth Attorney for Greenup, Kentucky, and as a representative of the class of Commonwealth Attorneys in the Commonwealth of Kentucky; Defendants-Appellees.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Table of Contents iv

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement 2

A. Kentucky's Checkered Electoral History and the "Electioneering" Buffer Zone Statute 2

B. The Historical Development of the Challenged Campaign Finance Laws 7

C. The Proceedings Below 11

Reasons for Granting the Petition 13

I. The Sixth Circuit Created a Circuit Split on a Question this Court has Already Deemed Important and it Resuscitated a Doctrine this Court Found to be "Functionally Meaningless." 13

II. The Sixth Circuit Created a Circuit Split on the Validity of Trigger Provisions Found in State and Local Campaign Finance Laws Around the Nation 21

III. The Sixth Circuit Created a Split of Authority by Permitting Post-Election Contributions to be Used to Repay Loans Candidates Made to Their Now Insolvent Campaign Committees 24

IV. The Sixth Circuit Opinion Striking Down Kentucky's Ban on Cash Contributions Misconstrues the Law and Raises an Issue of Substantial Importance 28

Conclusion 30

Appendix

Appendix A - Sixth Circuit Order Denying Rehearing - 4/20/04 . . . . . 1a

Appendix B - Sixth Circuit Opinion - 1/16/04 . . . . . 3a

Appendix C - District Court Memorandum Opinion and Order - 3/21/02 . . . . . 53a

Appendix D - Constitutional and Statutory Provisions Involved 87a

Appendix E - Selected Excerpts from Legislative History 110a

TABLE OF AUTHORITIES

Cases

Adventure Communications, Inc. v. Kentucky Registry of Election Finance, 191 F.3d 429 (4th Cir. 1999) 8, 10, 11

Akers v. Smiley, 21 S.W.2d 152 (Ky. 1929) 4

Alaska v. Alaska Civil Liberties Union, 978 P.2d 597 (1999), *cert. denied*, 528 U.S. 1153 (2000) 26

Anderson v. Spear, 189 F. Supp.2d 644 (E.D. Ky. 2004) . . . . . *passim*

Anderson v. Spear, 356 F.3d 651 (6th Cir. 2002) . . . . . *passim*

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 18

Broughton v. Ridings, 57 S.W.2d 672 (Ky. 1933) . . 4

Brown v. Hartlage, 456 U.S. 45 (1982) 14

Buckley v. Valeo, 424 U.S. 1 (1976) . . . . . *passim*

Burke v. Greer, 247 S.W. 715 (Ky. 1923) 4

Burke v. Tackett, 233 S.W.2d 115 (Ky. 1950) 4

Burson v. Freeman, 504 U.S. 191 (1992) . . . . *passim*

Butler v. Roberson, 164 S.W. 340 (Ky. 1914) 4

Commonwealth. v. Roberts, 140 S.W. 313 (1911) . . 4

Daggett v. Commission on Governmental Ethics and Election Practices, 205 F.3d 445 (1st Cir. 2000) 23

Davisworth v. Middleton, 155 S.W.2d 450 (Ky. 1941) 4

Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197 (1982) 18

Ferre v. Florida ex rel Reno, 478 So.2d 1077 (Fla.App. 1985), *aff'd* 494 So.2d. 214 (1986), *cert. denied*, 481 U.S. 1037 (1987) 26

Franks v. City of Akron, 290 F.3d 813 (6th Cir. 2002), *cert. denied*, 537 U.S. 1160 (2003) 29

Gable v. Patton, 142 F.3d 940 (6th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999) 10, 11, 22, 23

Greene v. Cawood, 20 S.W.2d 984 (Ky. 1929) 4

Howard v. Cockrell, 21 S.W.2d 455 (Ky. 1929) . . . 4

Humbert v. Heyburn, 42 S.W.2d 538 (Ky. 1931) . . 4

Jernigan v. Curtis, 622 S.W.2d 686 (Ky. App. 1981) 4

Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637 (6th Cir.) *cert. denied*, 522 U.S. 860 (1997) . . . 11

Lewis v. Sizemore, 118 S.W.2d 133 (Ky. 1938) . . . 4

McConnell v. FEC, 124 S. Ct. 619 (2003) . . . . *passim*

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) 14, 18, 19, 27, 30

Prewitt v. Caudill, 63 S.W.2d 954 (Ky. 1933) 4

Reynolds v. Sims, 377 U.S. 533 (1964) 13

Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997) . 20, 23

Schirmer v. Edwards, 2 F.3d 117 (5th Cir. 1993), *cert. denied*, 511 U.S. 1017 (1994) 13, 15, 17, 21

Scholl v. Bell, 102 S.W. 248 (Ky. 1907) 4

Scott v. Roberts, 96 S.W.2d 1046 (Ky. 1936) 4

Siler v. Ball, 350 S.W.2d 499 (Ky. 1961) 4

Smith v. Ward, 132 S.W.2d 762 (Ky. 1939) 4

United States v. Blandford, 33 F.3d 685 (6th Cir. 1994), *cert. denied*, 514 U.S. 1095 (1995) 8

United States v. Collins, 78 F.3d 1021 (6th Cir. 1996), *cert. denied*, 519 U.S. 872 (1996) 8

United States v. LeMaster, 54 F.3d 1224 (6th Cir.1995), *cert. denied*, 516 U.S. 1043 (1996) . . 8

United States v. O'Brien, 391 U.S. 367 (1968) 20

Wesberry v. Sanders, 376 U.S. 1 (1964) 14

Wilkinson v. Jones, 876 F.Supp. 916 (W.D. Ky. 1995) 24, 25

Statutes

28 U.S.C. § 1254(1) 1
Ky. Rev. Stat. § 117.235(3) 1, 13
Ky. Rev. Stat. § 121.150(13) 2, 10, 24
Ky. Rev. Stat. § 121.150(16) 2, 10, 25
Ky. Rev. Stat. § 121.150(21) 2, 10, 24
Ky. Rev. Stat. § 121A.010(11)(a) 1, 23
Ky. Rev. Stat. § 121A.030 . . . . . 1, 23
Ky. Rev. Stat. § 121A.030(5)(a) 10
Ky. Rev. Stat. § 121A.050(2) 1, 10, 28
Ky. Rev. Stat. § 121A.070(1) 1
Ky. Rev. Stat. § 121A.080 1
Ky. Stat. § 1470 3

Other Authorities

Weine, Triggering the First Amendment: Why Campaign Finance Systems That Include "Triggers" Are Constitutional, 24 J. Legis. 223, 227 (1998) 22-23

Kentucky: the Race for Governor, 85 Ky. L.J. 723 (1997) 7, 8, 9

The Attorney General of the Commonwealth of Kentucky, Gregory D. Stumbo, and the Kentucky Board of Elections, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 356 F.3d 651. The opinion of district court is reported at 189 F. Supp.2d 644.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 16, 2004. The Commonwealth's petition for rehearing was denied on April 20, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution.

The Fourteenth Amendment to the U.S. Constitution.

Ky. Rev. Stat. § 117.235(3).

Ky. Rev. Stat. § 121A.010(11)(a).

Ky. Rev. Stat. § 121A.030

Ky. Rev. Stat. § 121.A050(2)

Ky. Rev. Stat. § 121A.070(1).

Ky. Rev. Stat. § 121A.080 (4)-(5).

Ky. Rev. Stat. § 121.150(13), (16), and (21).

Relevant portions are provided in the appendix.

STATEMENT

This case presents the question whether and to what extent states may regulate speech around polling places in order to protect voters from violence, intimidation, and election fraud. It also presents questions about public financing laws. These questions have divided the circuits and raise issues of exceptional public importance.

A. Kentucky's Checkered Electoral History and the "Electioneering" Buffer Zone Statute

In order to deter vote fraud, intimidation, and violence on election day, Kentucky—like every other state—created a buffer zone around polling places. Buffer zone statutes prevent vote-buyers and persons intent on intimidating voters from approaching the polls on the pretext of engaging in last-minute campaigning. This Court has upheld such laws, recognizing the compelling state interests they serve. *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding Tennessee's 100-foot buffer zone).

The *Burson* plurality emphasized the history of election reform, both in this country and abroad, that demonstrated the need to restrict access to polling places. *Id.* at 200-06. The history of Kentucky's regulation of polling places is similar to that of its neighboring state of Tennessee, whose statute was found valid in *Burson*. Both states responded to the same

problems that had plagued elections since the founding of the republic.

According to a report of a committee of the 46th Congress, men were frequently marched or carried to the polls in their employer's carriages. They were then furnished with ballots and compelled to hold their hands up with their ballots in them so they could easily be watched until the ballots were dropped into the box. Many labor men were afraid to vote and remained away from the polls. Others who voted against their employers' wishes frequently lost their jobs. *Id.* at 201 n.7.

"Approaching the polling place under this system was akin to entering an open auction place." *Id.* at 202. The states' modern election laws were enacted in response to widespread bribery, corruption, violence and intimidation. Louisville, Kentucky's municipal government was one of the first in the United States to adopt the Australian ballot and limit access to the polling place. *Id.* This Court's description of the violence and corruption leading to the enactment of buffer zones around polling places nationwide closely matches Kentucky's experience, including its recent history of vote buying.

Before and after the turn of the last century, election fraud and violence were common occurrences in many parts of Kentucky. Vote buying and selling were, and still remain to a lesser extent, a well documented persistent plague throughout the twentieth century. Four years after the Louisville municipal ordinance mentioned in *Burson* was enacted in 1888, the Kentucky General Assembly enacted state-wide legislation, Ky. Stat. § 1470, which prohibited persons other than election officers from remaining within 50 feet of the polls except when voting. Other state laws made buying or selling votes a crime.

Those laws, unfortunately, did not eliminate the corrupt political culture of election fraud and violence in Kentucky. In the notorious 1905 Louisville city and county election, ballots were stolen, while in other election sites the polling places were secretly and illegally removed, and the voters in these precincts were deprived of the right to vote, while in still others, acts of violence were committed and the voters were driven from the polls and prevented from taking part in the election. *Scholl v. Bell*, 102 S.W. 248, 250 (Ky. 1907).

As described in many other reported Kentucky cases, voters willing to sell their votes, called "floaters," congregated around polls selling their votes to the highest bidders among vote buyers hired by candidates. As a result, elections were regularly invalidated. This pattern of corruption persisted throughout the century. See, e.g., *Butler v. Roberson*, 164 S.W. 340, 343-346 (Ky. 1914); *Burke v. Greer*, 247 S.W. 715, 716 (Ky. 1923); *Greene v. Cawood*, 20 S.W.2d 984, 986-87 (Ky. 1929); *Akers v. Smiley*, 21 S.W.2d 152 (Ky. 1929); *Howard v. Cockrell*, 21 S.W.2d 455 (Ky. 1929); *Humbert v. Heyburn*, 42 S.W.2d 538 (Ky. 1931); *Broughton v. Ridings*, 57 S.W.2d 672, 673 (Ky. 1933); *Prewitt v. Caudill*, 63 S.W.2d 954, 961 (Ky. 1933); *Scott v. Roberts*, 96 S.W.2d 1046 (Ky. 1936); *Lewis v. Sizemore*, 118 S.W.2d 133 (Ky. 1938); *Smith v. Ward*, 132 S.W.2d 762, 764 (Ky. 1939); *Davisworth v. Middleton*, 155 S.W.2d 450, 452 (Ky. 1941); *Burke v. Tackett*, 233 S.W.2d 115 (Ky. 1950); *Siler v. Ball*, 350 S.W.2d 499 (Ky. 1961); *Jernigan v. Curtis*, 622 S.W.2d 686 (Ky. App. 1981).

In these published opinions, Kentucky judges often lamented the harm caused by such persistent vote-buying. As our former Court of Appeals said in *Commonwealth. v. Roberts*, 140 S.W. 313, 315 (Ky. 1911):

> The bribe taker and the bribe giver, in high and low places, are the greatest, most persistent, and most insidious foes that modern government has to contend with; for the evil efforts of their corrupt bargaining impairs the strength and weakens the efficiency of every department of government that it touches. But at no place in our system is the vice of bribery so prevalent or its evil effects so pronounced as in the prolific field of popular elections. It is here that the widest opportunity for debauching the elector is afforded, and the prospect of discovery and punishment the least.

These cases amply describe Kentucky's long, sad history of fraud and corruption, in which bribes paid to voters influenced all types of elections, including judicial elections, elections for sheriff, school board, and other offices. In such a corrupt environment, otherwise honest candidates felt compelled to buy votes to outbid their adversaries in close elections. Voters had little incentive (other than financial) to participate in sham elections decided by votes bought and paid for by wealthy candidates or political machines.

The current ban on "electioneering" with 500 feet of a polling place had its genesis in 1987, when the Kentucky Attorney General appointed a Task Force to investigate election fraud and vote buying. The Task Force was created and appointed after the Louisville *Courier-Journal* ran a series of investigative reports describing corrupt election practices, including counties where vote buyers congregated around polling places and mixed with "floaters" openly selling votes.

During the 100 years since Louisville had first tried to address vote buying, little had changed except the price of a vote—in spite of the Commonwealth's 50-foot buffer zone. As

the *Courier-Journal* and Task Force exhibits illustrated, in one typical report from the time just before the current law was enacted:

> Two women and a man sit outside the Flat Fork polling place at Prater-Boarders school around 7 a.m. "They're floaters" says Will Issac, a strip mine foreman and long time resident of Coon Creek who agreed to be a tour guide for the day. "Floaters are people who sell their votes to the highest bidder." "How can you tell?" Well, you see they're not voting," Issac says. They're just sitting around waiting till the price goes up. . . . Issac, who lives in the precinct and who claims to have bought a fair number of votes himself talks to a few vote-buyers inside the school . . . "They're only offering $10 a vote," he reports.

"Winning at Any Cost: How Money Poisons Kentucky Elections," attached as Exhibit 71 to Deposition of Task Force Chairman, Ely; See Excerpt of Sixth Circuit Record, App. at 114a.

The Attorney General's Task Force reports and investigative news articles provided ample justification for the Kentucky General Assembly to enlarge the buffer zone from 50 to 500 feet. It did so in 1988. Ky. Acts 1988, ch. 341 § 30.

The ban on electioneering was extended from 50 feet to 500 feet because the prior statute had proven wholly ineffective. The further vote buyers are kept from the polls, the more difficult it is for them to collude with corrupt precinct officials. As the chairman of the Task Force later testified, the greater distance also makes it harder to use hand

gestures, nods of head and winks to signal which voters followed the instructions of the vote buyer and thus should be paid the agreed upon bribe.

In combination with other laws, the enlarged buffer zone has proven effective in deterring vote buying and preventing voter intimidation. Before the law was amended, election fraud was common. The Task Force Chairman testified that "[h]onest people [were] afraid to come to the polls." But since the buffer zone was enlarged, there have been far fewer reported court cases involving vote buying.[1] The Attorney General and state and local election officials firmly believe the law has finally given Kentucky citizens throughout the Commonwealth a chance at fair elections that citizens of other states take for granted.

B. The Historical Development of the Challenged Campaign Finance Laws.

Kentucky's history of campaign finance reform also follows the national trend. Prior to 1992, campaign finance reform in Kentucky received only minor attention. The only significant laws regarding campaign finance banned corporate contributions and limited individual contributions to $4000. See, J. Moore, Campaign Finance Reform in Kentucky: the Race for Governor, 85 Ky. L.J. 723, 734-739 (1997). The climate for election reform in Kentucky changed in the early 1990s. During this time, the Commonwealth suffered a

---

[1] As a side benefit, citizens in many counties are less intimidated to vote because they are not forced to "run a gauntlet" of campaign workers. Prior to the enactment of the 500-foot ban, campaign workers often took up all the parking places, crowded polling places, and accosted voters as they lined up to vote outside the polling stations.

number of high-profile political scandals, culminating in the indictment of various public officials and lobbyists. See *United States v. Collins*, 78 F.3d 1021 (6th Cir.1996) (affirming conviction of governor's husband for federal violations arising from gubernatorial fund raising activities); *United States v. LeMaster*, 54 F.3d 1224 (6th Cir.1995) (affirming conviction of state senator for making false statements to the FBI during investigation of corruption in the Kentucky General Assembly); and, *United States v. Blandford*, 33 F.3d 685 (6th Cir.1994) (same with respect to Kentucky's Speaker of the House). The public perception of corruption was all too justified. See *Adventure Communications, Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 442 (4th Cir. 1999) (discussing perception of corruption in Kentucky).

In addition to these scandals, the era of "millionaire candidates" winning the governor's race created a perception that ordinary citizens could not compete for the office. Millionaires won the office in 1979, 1987, and 1991. Governors John Y. Brown, Jr. and Wallace Wilkinson lent their campaigns a total of $3.55 million from their own pockets, only to be repaid by contributors *after* their election—by business interests who had, or sought, no-bid contracts to do business with the state. Campaign Finance Reform in Kentucky, 85 Ky. L.J. at 723, 736, 746. The public widely perceived the governor's office was for sale to businesses later awarded large state contracts.

Senator Mike Maloney proposed a plan to combat the increasing costs of the governor's race, and in particular the problem of millionaire candidates who spend vast amounts of their own money in "loans," only to be repaid by contributions once elected. Time and again, road builders and other political contributors received no-bid contracts from the

new administration after the election. The stench of corruption or the appearance of corruption finally demanded legislative attention. See Campaign Finance Reform in Kentucky, 85 Ky. L.J. at 736-37.

These same types of concerns led Congress to enact the Federal Election Campaign Act of 1971, the post-Watergate amendments to FECA in 1974, and the Bipartisan Campaign Reform Act of 2002. See, *McConnell v. Federal Election Comm'n*, __ U.S.__, 124 S. Ct. 619, 642-55 (2003) (discussing history of Congressional action designed "to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions"). As the record in *McConnell* demonstrated, big money political contributions often have less to do with a match between the contributors' and the candidate's ideology than with buying access and influence. *Id.* at 662-65.

Thus, in 1992, in an effort to curb further corruption and the appearance of corruption, the Kentucky legislature passed extensive campaign finance reform legislation, including a partial public funding system for qualifying slates of candidates seeking the office of governor and lieutenant governor, similar to the federal matching system for presidential primary elections. See KRS Ch. 121A. In order to comply with *Buckley v. Valeo*, 424 U.S. 1, 85-86 (1976), which upheld the federal system, participation in Kentucky's public finance scheme is voluntary. Candidates can receive matching funds if they agree to a campaign spending cap of $1.8 million per primary or general election. The Commonwealth provides participating candidates with two dollars for each dollar they receive in private contributions.

In order to assure candidates that participating in the voluntary public system will not leave them defenseless

against opponents who reject the spending cap, Kentucky law includes a "trigger" provision. Triggers are found in the laws of at least 12 other states. If an opposing slate opts out of the public financing system, the "trigger" is activated if that slate actually accepts contributions—including contributions from the candidates' own pockets—exceeding the $1.8 million cap. KRS § 121A.030(5)(a). If that happens, participating candidates are relieved of the spending cap and may continue to raise money and receive the two-for-one match. The Sixth Circuit, like every other circuit to review similar triggers, upheld Kentucky's trigger. *Gable v. Patton*, 142 F.3d 940, 947-49 (6th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999).

Again paralleling the federal system, Kentucky adopted reporting requirements enacted to police enforcement of its substantive campaign finance laws. The reporting requirements also makes it easier to trace campaign money used for illicit purposes, such as illegally buying votes. See, *Adventure Communications,* at 432. To prevent evasion of reporting requirements, Kentucky has prohibited contributions in cash, requiring that contributors use traceable instruments such as checks. KRS § 121A.050(2).

The legislature also addressed the phenomenon of wealthy candidates "lending" money to their campaigns, then soliciting contributions from persons with business before the Commonwealth. Candidates may still spend as much of their own money on their campaigns as they like, as *Buckley* requires. However, they can lend no more than $50,000 to their campaigns, and they cannot accept post-election contributions. KRS §§ 121.150(13), (16), & (21).

With some minor exceptions, the Fourth Circuit and Sixth Circuit courts of appeals have generally upheld the validity of Kentucky's campaign finance laws because they serve

compelling state interests—combating actual and perceived corruption in Kentucky elections. See, *Adventure Communications, supra*; *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 640 (6th Cir.) *cert. denied*, 522 U.S. 860 (1997); *Gable v. Patton*, *supra*.

C. The Proceedings Below.

Respondent Hobart "Hoby" Anderson was a write-in candidate in Kentucky's 1999 gubernatorial election. Anderson and his campaign committee, "Hoby for the Commonwealth,"[2] brought this action in the United States District Court for the Eastern District of Kentucky against the Kentucky Attorney General, the members of the Kentucky Board of Elections, the members of the Kentucky Registry of Election Finance, and several state prosecutors, all in their official capacities, seeking to enjoin enforcement of certain Kentucky election and campaign finance statutes, including: the 500-foot buffer zone around polling places; the trigger provision; the $50,000 limit on candidates' loans to their campaign committees; the ban on post-election contributions; and the ban on cash contributions.

Following the submission of cross-motions for summary judgment, the district court rejected all of Anderson's challenges. 189 F. Supp.2d 644. The Sixth Circuit reversed in part. As relevant to this petition, the appeals court:

> (1) struck down the buffer-zone statute as overbroad, saying "it prohibits speech over too much geography," and, absent a narrowing construction limiting the statute to the "magic words" of express advocacy, "it prohibits more speech than necessary to meet the

[2] The respondents will be referred to collectively as "Anderson."

State's protected interests," 366 F.3d at 666; App. at 29a;

(2) struck down the trigger provision, holding that although a prior panel had upheld the trigger in general, Kentucky could not count a nonparticipating candidate's expenditure of his own personal funds toward the trigger amount, 356 F.3d at 667; App. at 32a;

(3) struck down the ban on candidates' soliciting or accepting political contributions after the date of the general election, and the law limiting to $50,000 candidates' loans to their own campaigns, as "significantly imping[ing] upon a candidate's ability to deliver and to time his or her message," 356 F.3d at 670, 673; App. at 40a, 45a; and

(4) struck down the ban on cash contributions as "not closely drawn to avoid unnecessary abridgement of associational freedoms," 356 F.3d at 672; App. at 42a.

The Commonwealth's petition for rehearing or rehearing en banc was denied. The Attorney General joined by the Kentucky Board of Elections in defense of the buffer zone statute now petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Created a Circuit Split on a Question this Court has Already Deemed Important and it Resuscitated a Doctrine this Court Found to be "Functionally Meaningless."

The decision of the court of appeals striking down Kentucky's buffer zone around polling places despite its substantial interests in promoting free and fair elections misconstrues this Court's opinion in *Burson v. Freeman*, 504 U.S. 191 (1992), conflicts with *McConnell v. Federal Election Comm.* 124 S. Ct. 619 (2003), and directly conflicts with the Fifth Circuit's opinion in *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993) and it implicates important state interests of nationwide importance.

The Sixth Circuit's opinion striking down Kentucky's ban on electioneering within 500 feet of polling places, KRS § 117.235(3), raises the same significant issues that this Court found compelling when it granted certiorari in *Burson*. Kentucky, indisputably, has compelling interests of the highest order in protecting voters from coercion and protecting the integrity and reliability of its electoral process. The "right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Burson,* at 199 (quoting, *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

> Indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Burson, at 199. (quoting, *Wesberry v. Sanders*, 376 U.S. 1 (1964)). "No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter." *Brown v. Hartlage*, 456 U.S. 45, 54 (1982).

If the Sixth Circuit opinion stands, vote sellers and buyers will likely resume or increase their illegal trade and corrupt more elections; detection and prosecution of such bribery will be made more difficult; ordinary citizens will likely be deterred from voting for fear of violence, intimidation, and lack of confidence in the integrity of the democratic process.

Recognizing a positive relationship between voter turnout and the public perception of corruption is not unprecedented; as this Court has articulated, "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390 (2000). A perception that corrupt vote buyers and sellers control local elections could just as easily deter voter turnout. The Kentucky Attorney General and Board of Elections anticipate greater vote fraud and reduced voter turnout if the Sixth Circuit opinion stands.

Granting certiorari would provide this Court with an opportunity to address the issue left unanswered in *Burson*. "The real question then is *how large* a restricted zone is permissible or sufficiently tailored." *Burson, supra*, at 208 (emphasis in original). In *Burson*, this Court upheld a similar 100 foot restriction, but gave state legislatures and lower courts no guidance how much further than 100 feet, if any, states could go with buffer zones around polling places to combat vote fraud and corruption.

Beyond these compelling circumstances of utmost public importance to the voters in Kentucky, the Sixth Circuit opinion conflicts in significant ways with the methodology employed, and the teachings of this Court in *Burson v. Freeman*, *supra*; *McConnell v. Federal Election Commission*, *supra*, and other leading election law opinions, causing the Sixth Circuit to reach a direct conflict with the Fifth Circuit's opinion in *Schirmer v. Edwards*. This Court should grant certiorari to correct the Sixth Circuit's erroneous opinion and resolve the split in the circuits.

A. The Issue Advocacy Loophole. Barely one month after this Court held that the artificial "magic words" distinction between "express advocacy" and "issue advocacy" was "functionally meaningless" in the context of political advertising, the Sixth Circuit determined that Kentucky's ban on "electioneering" within 500 feet of a polling place was deficient for failing to make the same meaningless distinction, thereby rendering all such buffer zones around polling places constitutionally suspect, or subject to evasion and fraud. See, *McConnell, supra*, 124 S.Ct. 619 at 689.

The Sixth Circuit's *Anderson* opinion is the first published decision where any court has held a state must distinguish between "express advocacy" and "issue advocacy" in the context of buffer zones surrounding polling places. The Sixth Circuit held Kentucky's definition of electioneering must be construed to make this distinction in order to survive overbreadth scrutiny–irrespective of the distance involved in the particular buffer zone. 356 F.3d at 663-664; App. at 23a-27a. This has far reaching implications both in this context and with all election laws.

The Sixth Circuit plainly misunderstood a key holding in *McConnell*, which made clear "the express advocacy

limitation [in *Buckley*] . . .was the product of statutory interpretation rather than a constitutional command." 124 S.Ct. at 689. *McConnell* demonstrates communications designed to advocate the election or defeat of a candidate can easily be evaded by avoiding certain words. *McConnell*, 124 S.Ct. at 689 nn. 77, 78. Speakers seeking to influence elections do not possess inviolable free speech rights to engage in so called "issue advocacy."

This "meaningless" distinction grafted into the Kentucky electioneering law by the Sixth Circuit, if allowed to stand, will eviscerate campaign free zone laws by enabling corrupt vote buyers and sellers to gain close proximity to the nations' polling places, under the guise of claiming a right to engage in "issue advocacy." The distinction would also permit crowds of candidates, campaign workers, and vote buyers close proximity to polling places and to voters, so long as they do not expressly advocate electing a certain candidate using certain meaningless "magic words." Vote fraud, bribery, and intimidation will increase as crowds return to polling stations. Election officers will not be able to distinguish between the different types of advocacy.

The Sixth Circuit's naive view that criminal laws will be sufficient to deter illegal vote fraud or voter intimidation in Kentucky does not square with this Court's recognition in *Burson* that Tennessee's laws making it a misdemeanor to use violence or intimidation to prevent voting were not sufficient to secure Tennessee's compelling interests in promoting free and fair elections. Likewise, states are not constitutionally restrained to use only anti-bribery statutes when combating the evils of vote fraud. As this Court recognized in *Burson*, such criminal laws "fall short of serving a State's compelling interests because they 'deal with only the most blatant and

specific attempts' to impede elections." *Burson*, 504 U.S. at 206-207 (quoting *Buckley v. Valeo*, 424 U.S. 1, 28 (1976)).

B. The Important Question Left Unanswered in Burson. All parties, the district court and the Sixth Circuit recognized the challenge to Kentucky's ban on electioneering should be guided by this Court's opinion in *Burson v. Freeman*, where it examined the history of elections and upheld the constitutionality of Tennessee's 100-foot "campaign-free zone," but the parties and lower courts have drawn dramatically different lessons from the opinion. Petitioners, like the Fifth Circuit Court of Appeals in *Schirmer v. Edwards*, have construed *Burson* as teaching that states should have more latitude in crafting their buffer zones around polling places when vote fraud or voter intimidation are not novel or implausible legislative justifications.

This Court should use this opportunity to resolve the split of authority and clarify for the lower courts and states what it meant in *Burson*, when it described Tennessee's campaign-free zone as a "*minor* geographic limitation" that did not *significantly* impinge upon constitutionally protected rights, *Burson*, 504 U.S. at 210 (emphasis added), and when it said "Reducing the boundary [line] is a difference only in degree, not a less restrictive alternative in kind." *Id.*

At what distance does a campaign free zone around a polling place become a matter of constitutional dimension? Or, as this Court phrased the issue in *Burson*: How large a restricted zone is permissible or sufficiently tailored? *Id.* 504 U.S. at 208. This question was left unanswered in *Burson* leading to the split between the Fifth and Sixth Circuits.

C. *The Significant Interests at Stake.* No one can dispute Kentucky's compelling interest in preventing even the

appearance of corruption, let alone the reality. See, e.g., *McConnell*, 124 S. Ct. at 656-660. This buffer zone issue, like the election finance issues discussed below, reflect the tension between clashing fundamental rights and compelling public interests. There is an inherent tension between Congress's and the states' ability to regulate and promote free and fair elections and those who assert legitimate First Amendment concerns. *McConnell, supra*. How courts balance such interests is inevitably of significant importance deserving of this Court's attention. That is why this Court agreed to hear *Burson*.

There are also important issues of comity and federalism lurking in the Sixth Circuit's analysis, due to its too eager willingness to second-guess an elected state legislature in deciding what election laws are necessary to promote free elections. A common thread running through this Court's election law overbreadth First Amendment jurisprudence is a recognition that it is impossible to quantify by empirical evidence that a given state law is necessary to combat corruption or the appearance of corruption.

This Court has never required exacting proof to uphold these types of election laws. See *Shrink Missouri*, 528 U.S. at 389 ("[A] state statute is not void . . . for want of evidence"); *Burson*, 504 U.S. at 208 ("[B]ecause a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question"); *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), ("the

overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep").

The Sixth Circuit acknowledged "the deference due to the states in our federal system of government" and that "[t]he states' ability to conduct elections--particularly for state officers--should not be usurped or interfered with by the federal courts absent a clear violation of the United States Constitution." 356 F.3d at 656; App. at 9a-10a. Yet the panel opinion contradicts any notion of a deferential standard of review of Kentucky's election laws.

The Sixth Circuit takes Kentucky to task, as the respondents did, for failing to justify the invocation of its compelling interests with empirical evidence that the 500 foot electioneering ban – as opposed to some shorter distance -- is the exact footage necessary to eliminate corruption and intimidation, or a perception of such by the electorate. 356 F.3d at 658; App. at 12a. But in *Burson* this Court did not require such proof. This Court has consistently held, "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Missouri*, at 391; *McConnell*, 124 S.Ct. at 661. The Sixth Circuit largely ignored Kentucky history and the overwhelming evidence in the record which the district court found so compelling.

The prospect of vote buyers and sellers corrupting elections, the prospect of voter intimidation, and crowded polling places deterring voter participation and free and fair elections, is neither novel nor implausible–particularly in large regions of Kentucky. The Sixth Circuit failed to comprehend the longstanding evil of election fraud and the

harm it has done to Kentucky where citizens had good reason to lack confidence in the integrity of their elections. Strong medicine was needed to cure the evil of vote buying and selling.

Even worse, the Sixth Circuit speculated the Kentucky legislature's real desire was to stifle all speech on election day because a Special Commission on Election Reform which met before the law was enacted would have preferred to eliminate *all* electioneering on election day, if it was possible. 356 F.3d at 658; App. at 14a. The Sixth Circuit's error was to ascribe an impure motive to the Kentucky General Assembly based on the desires of some of the special commissioners. The Attorney General's Task Force proposed increasing the distance from 50 to 1000 feet, which the General Assembly reduced to 500 feet. This does not suggest a legislative desire to stifle free speech, but only a laudable attempt to address a longstanding crisis. By contrast to the Sixth Circuit's approach, this Court and other circuit courts recognize state and federal legislatures who are closer to the problems are often in the best position to know what laws are necessary–including those needed to promote free and fair elections. Courts should not usurp the role of legislators.

Moreover, it is well settled that isolated statements by individual legislators are not a sufficient basis from which to infer the intent of that entire legislative body. When determining constitutionality of a statute, it is improper to decide its fate based on what a handful of Congressmen said about it. *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); Accord, *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997) (Minnesota campaign finance statute should not be interpreted by an isolated statement by an individual legislator). Since that is so, it was even more fallacious for the Sixth Circuit to

conclude that a special commission's desires accurately reflect the legislative purpose underlying Kentucky's electioneering law. Kentucky and all other states have enacted laws establishing buffer zones as a time tested means of preventing voter intimidation and vote buying. *Burson*, at 206. There is no reason to suspect this was not the goal of the Kentucky legislature in this instance.

D. The Split Between the Circuits. Since this Court issued its *Burson* opinion, two circuits, the Fifth and the Sixth, have evaluated similar campaign free buffer zone statutes, but they reached dramatically different conclusions. In contrast to the Sixth Circuit's opinion, the Fifth Circuit believed voter intimidation predicated on voters forced to run a gauntlet of campaign workers was a legitimate concern. The Fifth Circuit upheld Louisiana's even longer 600 foot campaign free zone concluding it was neither excessive nor substantially overbroad. *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert. denied*, 511 U.S. 1017 (1994). Recognizing that states are not required to prove that such restrictions are perfectly tailored, the Fifth Circuit read *Burson* as predicting this Court would have supported a 600-foot limitation. It is a virtual certainty that the Fifth Circuit would have upheld Kentucky's electioneering law following the reasoning of its *Schirmer* decision. This case is a good opportunity to resolve the conflict within the circuits and offer more definitive guidance than it did in *Burson*.

II. The Sixth Circuit Created a Circuit Split on the Validity of Trigger Provisions Found in State and Local Campaign Finance Laws Around the Nation.

The Sixth Circuit's decision invalidating Kentucky's campaign finance law trigger provisions misconstrues this court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976),

raises issues of national importance, and conflicts with decisions from the First and Eighth Circuits, and an earlier panel of the Sixth Circuit. If the Sixth Circuit's opinion stands candidates will be able to give unlimited personal funds to their campaign without activating Kentucky's "trigger" while candidates who accept the same amount of funds from other contributors activate the "trigger." *Gable v. Patton, supra.* This makes absolutely no sense under prevailing election law and creates a split in the circuits.

The Sixth Circuit's opinion striking down major parts of Kentucky's public financing law greatly undermines its goals and objectives. This case has national significance because many other states have similar public financing schemes with similar trigger provisions. The Sixth Circuit misconstrued *Buckley v. Valeo*, where this Court prohibited any limitations on a candidate contributing money to his own campaign but did not prohibit states from including contributions as a triggering event that release participating candidates from their own voluntary expenditure limits as part of a public campaign financing scheme. The Sixth Circuit's opinion also creates a conflict in the circuits and other states which this Court should address to resolve.

States that have voluntary public financing laws that give candidates public funds in exchange for voluntary expenditure limits must give participating candidates some protection that if a nonparticipating candidate exceeds certain spending benchmarks the participating candidates will be released from their spending caps. Without such an assurance, serious candidates for office would be afraid to participate. These "trigger" provisions act as inducements for participating in campaign financing, not as a penalty against nonparticipating candidates. "In essence, triggers function as insurance policies." Weine, Triggering the First Amendment: Why

Campaign Finance Systems That Include "Triggers" Are Constitutional, 24 J. Legis. 223, 227 (1998).

Under Kentucky law, if a candidate who chooses not to participate or is ineligible to participate in public financing either accepts contributions or donates his own money aggregating 1.8 million dollars, the trigger statutes release the participating candidates from their voluntary expenditure limits. KRS §§ 121A.010(11)(a), 121A.030. The trigger statutes do not dictate what any candidates do when deciding to contribute to their own campaigns, or accepting contributions from others. Nonparticipating candidates are completely free to make their own strategic choices.

All other circuits that have examined this issue, including a prior Sixth Circuit panel that examined the same Kentucky law, have recognized such triggers are lawful because they are simply an attempt by the states to avert a powerful disincentive for participation in their public financing schemes: "namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit." *Rosenstiel v. Rodriguez*, 101 F.3d at 1551; *Gable v. Patton*, 142 F.3d at 949; *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445, 469 (1st Cir. 2000). By giving additional financing to fund more political speech by participating candidates, a trigger provision "promotes, rather than detracts from, cherished First Amendment values." *Rosenstiel,* at 1552.

A privately financed candidate such as Mr. Anderson has no expenditure limit. He may accept unlimited contributions. He may give his campaign unlimited funds. Under the Kentucky statute, the determination whether to donate or accept contributions in excess of $1.8 million and thus trigger the release of the opposition is a calculated strategic decision

to be made by the privately-financed candidate. *Wilkinson v. Jones*, 876 F.Supp. 916, 927 (W.D. Ky. 1995).

As the district court below concluded, this is a constitutional incentive to participate–not an unconstitutional coercive measure to deter nonparticipating candidates from accepting contributions or exceeding certain expenditures. "Fundamentally, it does not follow that simply because the Commonwealth has elected to treat contributions by candidates to their own campaigns as 'contributions' for purposes of counting toward activation of the trigger that therefore candidates are in any way limited in terms of the amount they may contribute." 89 F.Supp.2d at 659; App. at 83a-84a.

The Sixth Circuit's opinion, if it is allowed to stand, implicates compelling state interests in ending quid pro quo corruption, or the appearance of corruption, based on the court's misconstruction or unwarranted extension of *Buckley v. Valeo*. Because of the importance of this issue to all the states with public financing and to resolve the split in the circuits, this Court should grant this petition and address the issue.

III. The Sixth Circuit Created a Split of Authority by Permitting Post-Election Contributions to be Used to Repay Loans Candidates Made to Their Now Insolvent Campaign Committees.

Kentucky law prohibits a slate of candidates running for the office of Governor and Lieutenant Governor from loaning their campaigns more than $50,000 in a given election. KRS §§ 121.150(13), (21). A separate provision prohibits candidates from soliciting or accepting contributions after an election, historically used to repay such personal loans. KRS

§ 121.150(16). The district court upheld both provisions stating, "It cannot be denied that post-election contributions present unique possibilities of corruption, and are thus deserving of special precautions." 189 F.Supp.2d at 653-654; App. at 71a.

Anderson argued, and the Sixth Circuit agreed, that a loan to a campaign from a candidate must be treated in the same way as an expenditure or contribution "unless and until repaid." 356 F.3d at 672; App. at 43a. By contrast, district courts in Kentucky have upheld the loan limitation statute explaining that the $50,000 loan limit "removes the appearance that heavily indebted candidates are easy bedfellows for quid pro quo contributors." *Wilkinson v. Jones*, at 930. Kentucky district courts have determined the $50,000 loan limit is not "so low as to chill a candidate's early and loud speech," noting, "a $50,000 loan will buy a significant amount of speech (except on Super Bowl Sunday)." *Id.*, at 931.

The district court below distinguished candidate loans from candidate expenditures because loans require third party repayment, often after an election winner has been determined. "The opportunity to contribute to an announced winner opens the door for contributors to contribute not for the constitutionally-protected right of 'speaking,' but rather for the decidedly illegal purpose of quid pro quo corruption." 189 F.Supp.2d at 655; App. at 74a-75a.

In reversing, the Sixth Circuit recognized there was "little doubt" Kentucky had met its burden of demonstrating a sufficiently important interest. However, it concluded the statute was not closely drawn, and impinged on associational rights even where there is little risk of corruption following an election.

The Sixth Circuit's decision striking down Kentucky's ban on post-election contributions, is in direct conflict with state supreme court decisions in Alaska and Florida. Contrary to the Sixth Circuit decision in this case, the Alaska Supreme Court upheld a similar statute disallowing contributions. That court recognized, "post-election time limits ... far more clearly address corruption and appearance because the election has resolved the critical contingency of which candidate will hold office. We think this latter impact on associational rights is narrowly tailored to further compelling state interests." *Alaska v. Alaska Civil Liberties Union,* 978 P.2d 597, 630 (1999), *cert. denied*, 528 U.S. 1153 (2000). Also, contrary to the Sixth Circuit decision in this case, the Florida Court of Appeals rejected a similar challenge, recognizing "a post-election contribution to a winning candidate could be a mere guise for paying the officeholder for a political favor." *Ferre v. Florida ex rel Reno*, 478 So.2d 1077, 1079-80 (Fla.App. 1985), aff'd 494 So.2d. 214 (Fla. 1986), *cert. denied*, 481 U.S. 1037 (1987). The Florida court also said banning post-election contributions also serves as a reporting function so that voters will know which candidates have allegiances with various special interests. *Id.*, at 1080 & n. 10. This Court has also recognized such finance disclosure requirements aid voters in evaluating which candidate will be likely responsive to donars' interests "thus facilitat[ing] predictions of future performance in office," as well as deterring corruption or the appearance of corruption. *Buckley v. Valeo*, *supra*, 424 U.S. at 67-68.

In the present case, the Sixth Circuit recognized Kentucky had presented the same compelling interests as Alaska and Florida but said Kentucky's $1000 contribution limit substantially mitigates its concerns about a contributor "purchasing" undue influence after the election. 356 F.3d at 671; App. at 39a-40a. Beyond creating a conflict with Florida

and Alaska, the Sixth Circuit's decision ignores two crucial facts: First, that contributions reported after an election do not alert voters in time to educate them about the candidate; and, second, the court was naive about the common practice of business interests "bundling" their donations. For example, a road builder seeking a no-bid contract with the state can arrange to send contributions in the names of each of its managers, including their families and children. The appearance of corruption is not so "mitigated" as the Sixth Circuit believed.

This Court should grant certiorari to consider this important issue and resolve this split of authorities. Campaign contributions have been recognized as having an ephemeral free speech or free association quality because giving money shows a general expression of support for a candidate and his views. *Shrink Missouri*, 386-87. After an election, however, as Justice Stevens noted (when speaking of contribution limits generally), "money is property; it is not speech." *Shrink Missouri*, at 398 (Stevens, J., concurring).

Post-election contributions have, at best, only marginal First Amendment significance, whereas they work actual corruption in government and a corresponding suspicion among the electorate. Moreover, these dynamics do not necessarily change for *losing* candidates. Losing candidates often hold or seek other public offices and can be expected to exert great pressure on business people and regulated industries. If millionaire candidates want to lend money to their campaigns that is their choice. But, after the election, they should not be permitted to "shake down" business people and others who are subject to state regulation to retire their campaign debt owed to themselves. This looks more like a bribe or "pay-to-play" quid pro quo arrangement than speech.

IV. The Sixth Circuit Opinion Striking Down Kentucky's Ban on Cash Contributions Misconstrues the Law and Raises an Issue of Substantial Importance.

The final aspect of the Sixth Circuit's opinion which warrants review by this Court is its erroneous conclusion that a state may not ban cash contributions in a race for governor. KRS § 121A.050(2) bans cash contributions (i.e. hard money) in gubernatorial elections. The district court rejected Anderson's challenge noting "In Kentucky, a state in which cash has proven the preferred currency of electoral corruption, it would seem that prohibiting cash contributions is a virtual sine quo non of legitimate elections. Moreover, the provision is narrowly tailored." 189 F. Supp. 2d at 654; App. at 72a-73a. The district court observed this Court, in *Buckley*, had recognized disclosure serves informational functions, as well as the prevention of corruption and the enforcement of the contribution limitations. *Buckley*, 424 U.S. at 96.

The Sixth Circuit reversed the district court holding the statute was not closely drawn to avoid unnecessary abridgment of associational freedoms. The court said "The State's ban on *all* cash contributions effectively forecloses speech by a large body of individuals who will be chilled from making a *de minimis* contribution." 356 F.3d at 672; App. at 41a. This argument had not been thoroughly addressed by the Commonwealth because Anderson did not claim third party standing to argue First Amendment claims for potential contributors on this issue. He argued it kept him from selling water bottles, snow cones, t-shirts and other merchandise at flea markets and county fairs to finance his campaign, thus limiting him in his ability to raise money.

This is an issue of great importance because, if the Sixth Circuit's opinion stands, Kentucky and states in the Sixth Circuit will be precluded from requiring political donations to campaigns be made by check or money order. Without such a traceable money trail, Kentucky and other states will be hampered in their investigations of illegal slush funds used to buy votes, or engage in violations of campaign finance laws.

A prior Sixth Circuit opinion upholding a requirement that no contributions over $25 could be paid in cash illustrates why such laws serve a useful purpose and should be upheld over a candidate's First Amendment challenge. In *Franks v. City of Akron*, 290 F.3d 813, 818 (6th Cir. 2002), *cert. denied*, 537 U.S. 1160 (2003), the court said:

> This restriction clearly does not unduly burden a contributor because it does not affect the amount that one may contribute; it simply affects the manner in which one may contribute. A candidate's ancillary right to associate also does not suffer because a contributor pays by check, credit card, or money order rather than with cash. The provision serves the significant governmental interest of accountability by forcing contributions to be traceable. As a result, it makes corruption more difficult to hide in the face of a campaign audit. It is clearly valid under the First Amendment.

Although the *Franks* case involved a $25 limit, Kentucky's reporting interests are the same; and Kentucky's notorious history of political corruption justifies this reporting feature for even smaller contributions for gubernatorial elections. Illegal cash cannot be easily traced. As a former eastern

Kentucky judge, F. Byrd Hogg, observed speaking about Kentucky elections in his community: "You cannot win an election without money for bought votes, and cash is all they use." Nothing in the record suggests Kentucky's no cash contribution law is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Missouri*, 528 U.S. at 397. In view of the states' compelling interests in deterring, investigating, and prosecuting vote buying and other forms of political corruption, this Court should consider this issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

GREGORY D. STUMBO
Attorney General of Kentucky
Counsel of Record
D. BRENT IRVIN
Assistant Attorney General
JANET GRAHAM
Assistant Deputy Attorney General
700 Capital Avenue
Suite 118 Capitol Building
Frankfort, KY 40601-3449
(502) 696-5663

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 02-5529

[Filed April 20, 2004]

HOBART WARD ANDERSON, ET AL.,)
Plaintiffs-Appellants,)
)
v.)
)
LLOYD E. SPEAR, ET AL.,)
Defendants-Appellees.)
)

JUDGES: BEFORE: SILER, BATCHELDER, and COOK, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 02-5529

[Filed January 16, 2004]

HOBART WARD ANDERSON, et al.,)
Plaintiffs-Appellants,)
)
v.)
)
LLOYD E. SPEAR, et al.,)
Defendants-Appellees.)

Appeal from the United States District Court for the Eastern District of Kentucky at Ashland.
No. 99-00189. Joseph M. Hood, District Judge

JUDGES: Before: SILER, BATCHELDER, and COOK, Circuit Judges.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Appellant Hobart Ward Anderson ("Anderson" or "Appellant") appeals the decision of the district court granting summary judgment to Defendants-Appellees Kentucky Board of Elections, the Registry of Finance ("Registry"), the Commonwealth

Attorneys as a class, and the Kentucky Attorney General on nine separate claims challenging the constitutionality of various provisions of Kentucky election law. Having concluded that the district court erred in its evaluation of the substantial First Amendment interests asserted by Anderson, we reverse the district court except as to two claims-Anderson's equal protection claim, and his claim that the "trigger" provision is unconstitutional as applied-and remand for proceedings consistent with this order.

I.

Hobart Anderson filed to run as a write-in candidate in Kentucky's 1999 gubernatorial election. Because he and his slated running mate were not eligible to appear on the ballot for the general election, his campaign was not entitled to receive matching funds under Kentucky's Public Financing Campaign Act. Anderson alleges that the statutes he challenges proscribed several of the campaign activities he wanted to conduct, including: distributing within 500 feet of polling places literature instructing voters on how to cast a write-in ballot; soliciting and accepting contributions after the date of the general election; accepting cash contributions by selling items at fundraisers; lending over $50,000 of his own funds to his campaign; and soliciting and accepting contributions within twenty-eight days of the election. Mr. Anderson therefore filed this suit in October 1999 seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. The suit challenges nine separate Kentucky statutes regulating the conduct of elections and campaign finance: (1) KRS § 117.235(3), which prohibits "electioneering" within 500 feet of polling places; (2) § 121A.080(6), a "turn-over" provision requiring campaigns to turn over unexpended funds to the State; (3) § 121.150(16), prohibiting post-election solicitation of contributions; (4) § 121A.050(2), prohibiting

cash contributions; (5) § 121.150(13) & (21), providing that a candidate may not loan more than $50,000 of his personal funds to his campaign; (6) §§ 121.150(24) & 121A.030(5), prohibiting solicitation and acceptance of contributions within twenty-eight days before an election; (7) § 121A in general, regulating the public financing of elections; (8) § 121A.080(4)-(5), which allows candidates receiving public financing to exceed the contributions limit when other candidates do so; and (9) § 121A.010(11), which defines "contribution" as including a candidate's personal funds. The district court granted summary judgment for the Defendants on all counts. Anderson timely appealed to this court. The parties do not dispute any facts, and all of the issues presented in the lawsuit are questions of law.

II.

This court reviews the grant of a motion for summary judgment de novo. *Faughender v. City of North Olmsted*, 927 F.2d 909, 911 (6th Cir. 1991). As an initial matter, we must consider whether certain claims in the case are moot. Counsel at oral arguments asked us to take judicial notice of the fact that the Kentucky legislature has defunded the public finance program in the most recent budget, which states in relevant part:

> Notwithstanding KRS 118.255(3), 121.150, 121A.015(5), 121A.020, 121A.030, 121A.040, 121A.060, and 121A.080, no funds shall be appropriated to or received into the election campaign fund established by KRS 121A.020, and the Registry of Election Finance shall make no transfer of funds to any slate of candidates from the election campaign fund for any election. Notwithstanding KRS 121.150(24) and 121A.030(5), slates of candidates

> may accept contributions within the last 28 days immediately preceding a primary or general election, and in addition to the provisions of KRS 121A.020(5), all contributions to slates of candidates made within the last 28 days immediately preceding a primary or general election shall be reported to the Registry of Election Finance within 24 hours of receipt. All other statutes contained in KRS Chapter 121A shall remain in effect for all slates of candidates, except that KRS 121A.080(6) shall not apply, and slated candidates shall be governed instead by KRS 121.180(10), and KRS 121A.030(4) shall not apply, and all slated candidates may receive contributions from permanent committees which, in the aggregate, shall not exceed 25 percent of the contributions received by the slate in any one election up to a maximum of $300,000 in any one election.
>
> Act of March 23, 2003, ch. 156, 2003 Ky. Laws H.B. 269. Accordingly, Appellant will not be subjected to the operation of the public finance system, the 28-day prohibition on contributions prior to elections, or the trigger provision for the duration of Kentucky's current budget cycle. The question then is whether Anderson's claims related to those features of the public financing system continue to raise issues "affecting the rights of the litigants" in this case. *North Carolina v. Rice*, 404 U.S. 244, 92 S. Ct. 402, 246, 30 L. Ed. 2d 413 (1971).

This court has previously found that Congress may, through appropriations acts,"suspend, amend, or repeal a statute, so long as it does so clearly." *Mullis v. United States*, 230 F.3d 215, 217 (6th Cir. 2000). In *Mullis*, the plaintiff filed a petition asking the court pursuant to 18 U.S.C.

§ 925(c) to remove his firearm disability. Section 925(c) permits a district court to review a decision by the Secretary of Treasury to deny an application for relief of firearms disability. However, Congress had passed eight consecutive appropriations bills prohibiting the Secretary of Treasury from expending any funds to review these applications. *Id.* at 217. The court found that Congress clearly intended to suspend all relief that was otherwise statutorily authorized by defunding such relief. *Id.* at 218. In *Mullis*, the issue before us was whether the court's jurisdiction under § 925(c) extended only to reviewing the discretion of the Secretary, or whether the federal court had a basis for independent judicial review of Mullis's application for removal of disability. *Id.* at 219. The case did not involve a facial challenge, but only addressed Mr. Mullis's particular petition. Because the Secretary had not rendered a decision to review, this court found that the federal courts lacked jurisdiction.

Applying to state lawmakers *Mullis's* premise that the legislature may "suspend, amend or repeal" a statute by clear operation of appropriation acts, the question arises whether the acts of the Kentucky legislature in defunding the various parts of this campaign funding scheme renders Mr. Anderson's claims moot.[1] Importantly, Mr. Anderson's claims are not limited to this budget cycle. Appellant challenges the application of the 28-day prohibition on contributions and the trigger provision as applied to his candidacy in 1999, and challenges the apportionment of

---

[1] There is no claim that the operation of the appropriations act amended or repealed the relevant campaign funding statutes, only that the operative provisions were suspended by the appropriations act. Similarly, there is no claim that this court would not have an independent basis for judicial review so long as there is a valid case or controversy.

public benefits accomplished by the public funding scheme on its face. As is readily apparent, the action of the legislature suspending the operation of certain provisions of the campaign law does not eliminate the case or controversy which existed by the operation of those laws in 1999. Furthermore, because these laws are still on Kentucky's books, the legislature may choose at any time to allocate funds to the public finance program. Indeed, unlike *Mullis*, in which the legislature evidenced its intent to cease the operation of the law without regard to budgetary considerations, here there is nothing to suggest that the Kentucky legislature will not choose to refund the campaign scheme at the first fiscally feasible moment. The legislature's suspension of the operation of extant laws is not sufficient to deprive this court of jurisdiction, for it is well-settled that "'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'" *DeFunis v. Odegaard*, 416 U.S. 312, 318, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)). Accordingly, because Mr. Anderson's claims involve a live case or controversy, Kentucky's recent budgetary legislation does not deprive this court of jurisdiction.

III.

WHETHER KENTUCKY'S RESTRICTION ON ELECTIONEERING WITHIN 500 FEET OF POLLING PLACES (KRS § 117.235) IS UNCONSTITUTIONALLY OVERBROAD

The Kentucky legislature prohibits campaign activities near polling places on the date of an election: "No person shall, on the day of any election . . . do any electioneering at

the polling place or within a distance of five hundred (500) feet of a county clerk's office or any entrance to a building in which a voting machine is located . . . ." KRS § 117.235(3). Anderson brings a two-pronged challenge to the statute, alleging first that the 500-foot buffer zone is generally overbroad in violation of the First Amendment, and second that the definition of electioneering is unconstitutionally overbroad because it includes political speech that does not expressly advocate the election or defeat of candidates for public office. We examine these arguments in turn.

Our inquiry is guided by the Supreme Court's decision in *Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992), in which the Court examined the constitutionality of a 100-foot "campaign-free zone" surrounding polling places. First, *Burson* requires the application of exacting scrutiny to restrictions on political speech around polling places. *Burson*, 504 U.S. at 198 (noting that to survive review, a statute must be necessary to serve a compelling state interest and narrowly drawn to achieve that end). While exacting scrutiny does apply, the Supreme Court adopted a modified "burden of proof" in cases in which exercise of a First Amendment right threatens to interfere with the act of voting itself. *Id.* at 209 n.11. Under this modified burden, the state must demonstrate that its response is "reasonable and does not *significantly impinge* on constitutionally protected rights." *Id.* at 209 (emphasis in original) (citation omitted).

The modified burden of proof is an important component of the *Burson* analysis, for it stands as the Supreme Court's recognition of the deference due to the states in our federal system of government. The states' ability to conduct elections-particularly for state officers-should not be usurped or interfered with by the federal courts absent a clear

violation of the United States Constitution. By modifying the burden, the *Burson* Court recognized that states are uniquely equipped to manage their own elections, which "vary from year to year, and place to place," making it "difficult to make specific findings about the effects of a voting regulation." *Id.* This modified burden therefore assures that the state's interest in conducting elections is respected, while assuring that the First Amendment rights are not significantly burdened by overbroad regulations.

Applying this standard, the *Burson* Court recognized two compelling interests for buffer zones around polling places: 1) the state's duty to protect "the right to vote freely for the candidate of one's choice," *id.* at 199 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964)); and 2) the state's interest in preserving "the integrity and reliability of the electoral process itself," *id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983)). Put more succinctly, the Court recognized the states' interest in preventing voter intimidation and election fraud. *Burson*, 504 U.S. at 206.

Having found a compelling interest, the Court then went through the history of measures enacted in the states and in other countries to address voter intimidation and election fraud. It concluded that "widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." *Id.* at 206. The Court therefore upheld a 100-foot buffer zone surrounding a polling place. However, of particular relevance to the instant inquiry, the *Burson* Court refused to provide a bright-line rule as to how far the State could regulate speech around a poll. Id. at 210-11 ("This Court has not employed any 'litmus-paper test' that will separate valid from invalid restrictions.") (internal

citations omitted). Instead, it offered two indications of how to determine "how far is too far"-that is, when a buffer zone is large enough to significantly impinge on protected First Amendment rights. First, the Court noted that the difference between the 100-foot boundary upheld and the 25-foot boundary recommended by those challenging the law was "a difference only in degree, not a less restrictive alternative in kind." *Id.* at 210. Second, the Court clarified that "at some measurable distance from the polls . . . governmental regulation of vote solicitation could effectively become an impermissible burden akin to the statute struck down in *Mills v. Alabama*, 384 U.S. 214, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966) [(striking down a prohibition on editorials endorsing candidates run on election day)]." *Id.* at 210. Thus, at some undetermined distance, the *Burson* Court acknowledged, a regulation could be different in kind insofar as it impermissibly burdens First Amendment speech.

Appellant asserts that under the *Burson* standard, the 500-foot buffer zone fails because it is not narrowly tailored. Appellant's use of "narrowly tailored" to describe the test is not precisely correct, and fails to grant the State the deference required. While *Burson* does refer to narrow tailoring, it later applies the loosened requirement which gives deference to a state regulation so long as it is reasonable and does not "significantly impinge on constitutionally protected rights." *Burson*, 504 U.S. 191, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (emphasis omitted) (citation omitted). Applying the *Burson* "significant impingement" test, we conclude that the 500-foot buffer zone is facially overbroad.

The most recent Kentucky Elections Laws had their genesis in 1987, when the Acting Kentucky Attorney General appointed a Task Force to investigate election fraud. The Report of the Attorney General's Task Force on Election

Fraud begins its statement concerning the problem of electioneering near polling places with the justification of preventing corruption:

> Presently, the law allows "electioneering" to occur outside a 50 foot radius from the voting machine. This makes it fairly easy for persons interested in subverting the election process to accost voters going to and from the polls and harass or intimidate them within close proximity of the voting booth itself.

But the Task Force does not stop there, and suggests that the State's rationale also may include suppression of protected speech:

> Further, many people find even legitimate "electioneering" such as handing out brochures to be offensive when conducted near the polling place, especially when the resulting effect is to be required to "run a gauntlet" in order to enter the polling place.

After finding the existing 50-foot buffer zone inadequate to address the potential for election fraud and "unnecessary" electioneering, a subsequent Special Commission on Election Reform recommended that the buffer zone be increased to 500 feet. The Commission and the Task Force subsequently agreed on suggesting 1000 feet. The buffer zone was reduced in the Kentucky House to 500 feet, which is the distance ultimately codified in KRS § 117.235.

While the State does provide ample evidence of Kentucky's history of election fraud and corrupt elections practices, glaringly thin is its evidence as to why the legislature, the Task Force, or the Commission ultimately arrived at a distance of 500 feet. Even Hiram Ely III, Director

of the Kentucky Task Force on Election Fraud, cannot recall how his Task Force arrived at its proposed recommendation of 1,000 feet. Indeed, when pressed in his deposition, Mr. Ely could not even say whether the Task Force would have found 2,000 feet unreasonable:

> Q: According to your Task Force report, you recommended that 1,000-foot be where the line be drawn. I would infer from that that 2,000 feet would probably be unreasonable?
>
> A: I don't know. We just came up - we came up with that number through the process I described. We thought it was reasonable for the reasons I have stated. And that's all, really, I can say about it.
>
> Q: According to your Task Force report, you recommended that 1,000-foot be where the line be drawn. I would infer from that that 2,000 feet would probably be unreasonable?

What little discussion is in the record, however, suggests that the State sought through the 500 foot barrier to prohibit *all* electioneering speech on election day. For example, the minutes of Second Meeting of the Special Commission on Election offers the following default rationale for adopting the 500 foot barrier:

> A thorough discussion ensued relative to instituting a statewide ban of electioneering on election day. The Commission voted by 11 yes and 4 abstentions that there should be a statewide prohibition of electioneering on an election day if such a ban can be established constitutionally. If this is not possible, the Commission proposes to recommend prohibiting

> electioneering as defined in KRS 117.235 within a 500 foot radius of the entrance to the polling place which is generally used by the voters.

It thus appears that Kentucky, to the extent possible, sought to eliminate all electioneering on election day. This *Burson* simply does not permit. *See Burson*, 504 U.S. at 210 ("At some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden . . . .")

While unable to provide much in the way of an *ex ante* justification for the specific distance, Kentucky nonetheless proffers numerous after-the-fact testimonials to support the decision to expand the buffer zone to 500 feet. First, Kentucky cites the affidavit of Darrell Fugate, an admitted vote buyer, for the proposition that he bought votes from distances beyond 100 feet of the polling places. Mr. Fugate's testimony is interesting, but not for the reason cited by the State. Rather, he confirms that the regulation has had a detrimental effect on constitutionally protected speech. ("The area surrounding the polling places is no longer crowded with people electioneering and attempting to hand out cards.") Furthermore, Mr. Fugate confirmed that he stopped buying votes not because of the 500-foot speech ban, but rather because of the increase in the criminal penalty for buying votes. Mr. Fugate admits that "after the legislature changed the statute to make vote selling and vote buying a felony instead of a misdemeanor, I no longer bought votes. " By contrast, he speculates that the 500-foot barrier would have only "hindered" his ability to buy votes. Accordingly, Mr. Fugate's testimony undermines the State's position by demonstrating first, that the 500-foot restriction substantially impinges on protected speech, and second, that the

government's interest is better served through stricter penalties than through broad bans on protected speech.

Kentucky next claims that the 500-foot barrier puts the vote buyer far enough away that he cannot discern signals commonly used between vote buyers and corrupt poll workers/insiders to determine whether the voter has cast his vote according to the wish of the would-be vote buyer. Referring to a series of photographs taken at polling places depicting a subject signaling by taking off his hat, Appellees assert that "at 100 feet, one can easily see a visual signal such as taking off a hat. At 500 feet, it is virtually impossible to ascertain whether a signal is being given." This evidence, however, appears to be contradicted by the testimony of Mr. Ely, who stated during deposition that the problem of signaling was essentially solved by making the buffer zone apply to the *building*, rather than to the *polling booth* itself:

> Q: During the - during the decision regarding the 1,000-foot number, do you recall whether-what were you talking about a minute ago-the visual signaling-whether that was a factor in your-all's consideration?
>
> A: I think it was. And I think that was more related to moving it outside the building as opposed to away from the polling place. We used the building as the solution.

This testimony suggests that the major issue in eliminating signaling was making sure that the building was free of electioneers and vote buyers, rather than placing greater geographic distance between the building and the electioneers. Indeed, having solved the problem by fixing the distance to the building rather than the voting booths, Mr. Ely's next statement suggests that something very different from

preventing voter intimidation and voter fraud motivated the State to expand the distance outside the building:

> I think the-and again, I don't remember how we settled on the number. One of the concerns about it, once you got outside the building, was you didn't want people to have to work their way to the building from the parking lot. You wanted to be able to have somebody park their car and go vote. If they-if they-there would be plenty of electioneers outside 1,000 feet. If they wanted to see them, they could go see them. But if they wanted to simply get out of their car and go vote without having to deal with that, we felt they should be able to do that.

Accommodating the desire of voters to completely avoid contact with anyone handing out legitimate electioneering communications is a far cry from preventing voter intimidation and voter fraud. This theme of completely preventing voter contact with those who have a legitimate electioneering message was repeated by Kentucky in its reliance on the deposition of James Lewis, who ran for county clerk in 1985. Mr. Lewis spoke about the number of campaign workers, and the crowding around polling places. He testified that with 82 people on the ballot, there were at least 150 poll workers. Again, however, it appears that Appellees' interests were often at best aesthetic and at worst suppression of constitutionally protected speech:

> You know, it was almost impossible to get in to vote. You had handfuls of cards that people came in, threw down in the floor, threw down in the polling booth, because they weren't interested in those. And I remember, you know, the first election when we had the 500 feet ban, I had, you know, comment after

> comment from people, that this was the way elections should be, that, you know, they didn't have to run the gauntlet, they didn't have to take all these cards that they didn't want to take, because they didn't want to offend people by not taking their card. It really has changed the appearance of the polling places. You don't have the crowds hanging around on election day.

While Mr. Lewis makes one passing reference to intimidation and vote buying, his testimony is primarily concerned with restraining protected speech, which voters disfavored for reasons of mere convenience. Given these statements, it should not be surprising that Kentucky closes its argument in this section by relying on the "right of every person 'to be left [sic] alone' . . . ." Ky. AG. Br. at 21 (quoting *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970)). Thus, the government suggests an interest based upon the fact that "many voters simply do not want to be approached on their way to the voting booth."

Again, this interest is a far cry from the prevention of corruption and intimidation-the only justifications the Supreme Court recognized in *Burson* to meet the requirements of exacting scrutiny. The Supreme Court has long recognized that "mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the [First Amendment] rights so vital to the maintenance of democratic institutions." *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 161, 60 S. Ct. 146, 84 L. Ed. 155 (1939). Appellees' reliance on *Rowan's* limited right to be left alone does not tip the jurisprudential scales. The Supreme Court generally has resisted the

invitation to extend to public spaces the limited right of individuals to be left alone *inside* their homes, even when the messages may prove to be offensive to the listener. *See generally National Socialist Party of Am. v. Skokie*, 432 U.S. 43, 97 S. Ct. 2205, 53 L. Ed. 2d 96 (1977) (granting a stay to an injunction of a Nazi march scheduled to be conducted in a neighborhood that included numerous holocaust survivors, who respectively had voiced their desire to be left alone); *see* also *Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (noting that the risk of offense was not a basis for restricting the ability of a speaker to wear a jacket adorned with a vulgar message in a courthouse, but rather that those offended may overt their eyes). The Kentucky AG points to an exception to the rule that the right to be left alone applies only in the solitude of one's home: the Supreme Court's recent decision in *Hill v. Colorado*, 530 U.S., 120 S. Ct. 2480 703, 147 L. Ed. 2d 597 (2000), applying the right to be left alone to buffer zones around abortion clinics. However, this decision addressed a narrower regulation (100-foot buffer zone with 8-foot floating buffers) in the unique context of abortion. As the dissent in *Hill* noted, the Court's First Amendment jurisprudence in the abortion context is different in kind from its First Amendment jurisprudence outside the abortion context, resembling an "'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice." *Hill*, 530 U.S. at 741 (Scalia, J., dissenting) (quoting *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 785, 129 L. Ed. 2d 593, 114 S. Ct. 2516 (1994) (Scalia, J., concurring in judgment in part and dissenting in part)). It is therefore dubious at best that this so-called right to be left alone, which under *Rowan* has peculiar application to the home, should be extended to those approaching polls, *especially where the Burson Court did not*

do so. The *Cohen* case is instructive regarding the limits of the right to be left alone found in *Rowan*:

> While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, *e.g.*, *Rowan v. United States Post Office Dep't.*, 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970), we have at the same time consistently stressed that 'we are often 'captives' outside the sanctuary of the home and subject to objectionable speech.' *Id.*, at 738, 90 S. Ct. , at 1491. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.

Cohen, 403 U.S. at 21. If the right to be left alone provides an insufficient basis for the states to restrict the display of profanity in the courtroom or Nazis marching down residential streets occupied by objecting holocaust survivors, then the State's interest in assuring that voters are not subjected to any unwanted campaign speech alone cannot be a sufficient basis to regulate that clearly protected speech.

Thus, notwithstanding the justifications offered, the evidence provided by Kentucky suggests that the buffer zone was intended to cut off *all* electioneering speech. This is consistent with the distance of the speech restriction, which, based on the pictures of the polling places in the record, would place many electioneers far beyond the point where they could come into contact with voters. We need only consider how large Kentucky's 500-foot barrier is to

recognize the degree to which the restriction impinges on free speech. At first blush, this buffer zone might appear to be five times as large as the 100-foot buffer zone at issue in *Burson*- an expansion which alone might generate concern. But such a calculation fails to take into account the fact that the buffer zone runs in all directions from the building. Therefore, the buffer zone, unless it is interrupted by private property, covers an area 25 times larger than the area at issue in *Burson*. The regulation has the potential to silence constitutionally protected speech for 18 acres around a voting booth, and guarantees that those wishing to express their opinions about the election are prohibited from coming within the length of 1 and 2/3 football fields of the polling place. The geographic scope of this regulation alone raises constitutional concerns. *See NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) ("Broad prophylactic rules in the area of free expression are suspect.").

Burson permits states to create buffer zones around polling places for two purposes only: the prevention of voter intimidation and the prevention of corruption. Kentucky's own witnesses make clear that the extreme geographic [**27] distance was not selected for these permissible purposes, but was intended to prevent voters from being bothered by constitutionally protected speech. This *Burson* does not permit.

At least one other court has found that a 500-foot buffer zone fails the standard established in *Burson*. *See Calchera v. Procarione*, 805 F. Supp. 716 (E.D. Wis. 1992). Appellees attempt to distinguish *Calchera* by noting that Kentucky's statute has an exception for electioneering on private property, while the statute at issue in *Calchera* did not. Appellees therefore argue that at voting places surrounded by private property, electioneering may occur within 500 feet,

thereby obviating what would otherwise be 750,000 sq. feet of enforced silence. But the statute's exception is far narrower than Appellees would have this court believe. The private property exception reads:

> Nothing contained in this section shall prohibit electioneering conducted *within* a private residence or establishment other than that in which the polling place is located by persons having an ownership interest in such property.

KRS § 117.235(3) (emphasis added). This exception is substantially narrowed in two ways by its own terms. First, the word "within" makes the exception virtually non-existent by prohibiting any political speech outside the interior confines of the actual house or business. Based upon the plain language of the statute, an individual who owns a house within 500 feet of a polling place may not display a political yard sign, or stand on his lawn or near the edge of his property distributing literature, because this speech would not be "within" a private residence or establishment. Indeed, the only place that the property owner would be free to speak would be physically inside his own home. It strains credulity to assert that a statute is narrowly tailored because it exempts residential living rooms. Second, the statute only exempts speakers who have an ownership interest in the property. Therefore, the owner of a home or business could not invite a campaign worker into her home or establishment to speak about the election without running afoul of the 500-foot restriction on campaign speech. Contrary to the State's assertion, this wafer-thin exception does not cure the overbroad speech regulation.

Furthermore, while it is laudable (and requisite) that the Kentucky statute exempts private property, this carve-out does

very little for voting places surrounded by public parking lots and roads. The problem of buffer zones surrounding urban voting places was recognized in *State v. Schirmer*, 646 So. 2d 890, 901 (La. 1994), in which the court noted that buffer zones raise serious concerns

> in a crowded urban context, where, because of greater population density, polling places tend to be more closely situated. In such circumstances the 600 foot [buffer zone] radius may often include a large number of surrounding streets, alleyways, and neutral grounds, with the application of the statute as written stifling political speech in traditional public fora.

Id. Accordingly, for urban voting places in Kentucky, the 500-foot barrier does create 750,000 sq. feet of silence, and threatens to stifle speech in public fora. The fact that the State recognizes that it may not trample free speech within private property does not relieve it of its obligations under *Burson* to avoid significantly impinging on First Amendment rights on *public* property.

To contrast *Calchera*, Appellees point this court to *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), in which the Fifth Circuit upheld Louisiana's 600-foot buffer zone around polling places. *But* see *State v. Schirmer*, 646 So. 2d 890 (finding that a 600-foot buffer zone applied to all political speech was overbroad). The Fifth Circuit found that Louisiana had a compelling interest in keeping poll workers-who the State demonstrated were used to intimidate voters-from impeding the voting process, and suggested that the difference between Louisiana's previous 300-foot barrier and the 600-foot barrier is only a difference in degree. *Id.* at 122. By contrast, the evidence presented by Kentucky's own witnesses suggests that the 500-foot barrier is different in

kind: it is designed to prevent voters from having contact with any speech whatsoever immediately prior to voting. This overbroad restriction significantly impinges on protected speech, and fails the test established by *Burson*.

Overbreadth of "Electioneering"

Appellant also challenges the 500-foot barrier by claiming that its restriction on "electioneering" is overbroad, and captures more constitutionally protected speech than is necessary to promote the State's interest. The 500-foot buffer zone prescribed by Kentucky law applies to electioneering, which is defined to include "the displaying of signs, the distribution of campaign literature, cards, or handbills, the soliciting of signatures to any petition, or the solicitation of votes for or against any candidate or question on the ballot in any manner, but shall not include exit polling." KRS § 117.235(3). Counsel for the Kentucky State Board of Elections informed Mr. Anderson that distributing instructions to voters on how to cast a write-in votes "would be considered 'electioneering' and, therefore would be subject to the restrictions of KRS § 117.235 (e.g., [sic] this practice would be precluded at the polling place or within five-hundred (500) feet of the voting place, etc.)."

Mr. Anderson challenges the buffer zone as overbroad based on the content proscribed by the definition of electioneering. Specifically, Anderson suggests that buffer zones should be applied only to "express advocacy," and not to "issue advocacy."

To understand the difference between express advocacy and issue advocacy, we must look to the seminal case of *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). In *Buckley*, the Supreme Court interpreted a

provision of the Federal Election Campaign Act ("FECA") that capped the amount of independent expenditures an individual could make "relative to a clearly identified candidate . . . ." *Id.* at 39. The statute therefore treated expenditures that were made by individuals other than the candidate or the candidate's campaign as subject to contribution limitations if the expenditure satisfied the vague requirement of being "relative to a clearly identified candidate."[2] In interpreting this section, however, the Court was confronted with a substantial statutory vagueness and overbreadth issue. *See McConnell v. Federal Election Comm'n*, 124 S. Ct. 619, 687, 157 L. Ed. 2d 491 (U.S. 2003). If the Court did not circumscribe the term "relative to," the regulation could apply to broad categories of issue-related speech, which may or may not have any relation to the election or defeat of specific candidates. In order to avoid overbreadth, the Court utilized a bright-line rule, and found that "relative to" referred only to expenditures using terms of express advocacy, which it defined as words such as vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, and reject. *Id.* at 687; *see also Buckley*, 424 U.S. at 44 & n.52. By offering a narrowing construction, the Supreme Court interpreted the statute so as to avoid sweeping in more protected speech than is necessary to prevent corruption.

---

[2] The term "independent expenditure," which refers to money spent by an individual to expressly advocate the election or defeat of a clearly identified candidate, should not be confused with candidate or campaign expenditures. Under *Buckley*, candidate or campaign expenditures may not be limited, because such limitations would operate as a direct limitation on the speech of the candidate. Independent expenditures, however, are treated like contributions, and under *Buckley* may be subjected to limitations.

Anderson asserts that the rationale behind the express advocacy distinction applies with equal force in the *Burson* context. Kentucky responds by noting that *Burson*, which was decided after *Buckley*, did not make any distinction between issue and express advocacy. But it would be extreme indeed to infer a rejection of the theory from silence, especially where there is no evidence suggesting that the argument was ever raised before the *Burson* Court.

Kentucky begins its opposition to applying an issue advocacy/express advocacy distinction by stating that "no court has ever applied these concepts to the protection of the integrity of the polling place." For this proposition, Kentucky again cites *Schirmer v. Edwards*, in which the Fifth Circuit upheld a complete ban on politicking within a 600-foot zone of a polling place. Appellees interestingly fail to address the subsequent decision of the Louisiana Supreme Court in that very case, which *did* apply something like an issue advocacy/express advocacy distinction. In *Louisiana v. Schirmer*, the court found that a complete ban on all political speech (that is, both issue advocacy and express advocacy) within 100 feet of a polling place would likely pass muster. However, the court struck down the same provision when it was extended out to 600 feet, because at such a great distance it significantly impinged upon First Amendment rights by sweeping in adjacent alleys, sidewalks, and other property traditionally open to political discourse. *See* 646 So. 2d at 901.

We must also take note of the Supreme Court's recent decision in *McConnell v. Federal Election Commission*. In *McConnell*, the Supreme Court revisited the express advocacy/issue advocacy line first drawn in *Buckley*. *See McConnell*, 124 S. Ct. at 687. The *McConnell* Court stated that:

> a plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and disclosure contexts, was the product of statutory interpretation rather than a constitutional command. In narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.

Id. at 688. Because the Court found that the *Bipartisan Campaign Reform Act*'s definition of "electioneering communication" raised "none of the vagueness concerns that drove our analysis in *Buckley*," the Court found that the express advocacy distinction was not necessary. *Id.* at 689. In eschewing the express advocacy distinction, the Court also relied upon substantial evidence that the line between express and issue advocacy had become "functionally meaningless" as applied to the Federal Election Campaign Act. *Id.* at 689. Accordingly, while the *McConnell* Court disavowed the theory that "the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy," it nonetheless left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest. And *McConnell* in no way alters the basic principle that the government may not regulate a broader class of speech than is necessary to achieve its significant interest.

Unlike the statute at issue in *McConnell,* Kentucky's statute is vague, sweeping in, *inter alia,* "the displaying of signs, the distribution of campaign literature, cards, or

handbills . . . ." KRS 117.235[3]. While this language could be interpreted as limited to express advocacy, the Kentucky State Board of Elections has chosen a broader-indeed an overbroad-interpretation of the statute in finding that instructions on how to cast an absentee ballot constitute electioneering. Also unlike *McConnell*, the record here is devoid of evidence that such a broad definition is necessary to achieve the State's interest in preventing corruption-or, to use *McConnell's* words, that an express advocacy line would be "functionally meaningless" as applied to electioneering proximate to voting places.

Accordingly, because Kentucky's statute is vague and because the State has failed to provide any evidentiary support for regulating both express and issue advocacy, we find that this Court should apply a limiting construction. The reasoning of *Buckley*, *McConnell*, *Schirmer*, and *Burson* suggests that a prophylactic restriction which extends to issue advocacy--that is, protected speech which does not directly seek to elect or oppose specific candidates--cannot be maintained unless the state demonstrates that the limitation was necessary to prevent intimidation and election fraud. Because Kentucky has failed to demonstrate that interest here, we apply a narrowing construction to the term "electioneering,"and find that it may permissibly apply only to speech which expressly advocates the election or defeat of a clearly identified candidate or ballot measure.

---

[3] While a reporting requirement would also chill association, a requirement that the contributor provide only a name or address would presumptively be less chilling as applied to associational freedoms.

The question of whether Kentucky may regulate issue advocacy proximate to the polls raises an issue of broad constitutional import. While Mr. Anderson's particular speech-i.e., providing instructions on how to vote for write-in candidates-at first glance looks like a relatively narrow class of speech, his legal challenge to a definition of electioneering which includes issue advocacy raises constitutional concerns about a broad class of speech. The Kentucky State Board of Elections fails to explain why providing instructions on how to cast a write-in vote would constitute "electioneering" for the purposes of the statute. Thus, as best we can tell, the Kentucky law as interpreted by the Board of Elections would forbid an individual to remind voters to fill in the ovals completely on optical scan ballots. Given the Board's decision, it would also appear that individuals would be prohibited from displaying signs or distributing leaflets which fall into core issue advocacy: that is, promoting issues rather than specific candidates. If "electioneering" includes Mr. Anderson's instructing voters on how to cast a write-in vote, does it also include, for example, parents urging voters to "support our schools"? All issue-related speech is chilled by the Board's interpretation of "electioneering." However, the State has failed to provide evidence to support a finding either that a regulation so broad is necessary to prevent corruption and voter intimidation, or that the regulation does not significantly impinge on the rights protected by the First Amendment.

The Kentucky Attorney General objects that a narrowing construction of the term "electioneering" would have dire consequences, and points to *Ellis v. Meeks*, 957 S.W.2d 213, 44 10 Ky. L. Summary 14 (Ky. 1997), for support. In *Ellis*, a candidate was found to have violated KRS 117.235 by, *inter alia*, bringing chicken to poll workers and making it available to voters at polling places. Appellees suggests that under the

Appellant's theory, a candidate could engage in "all manner of improper conduct that may or may not constitute 'express advocacy'" within 500 feet of a polling place. They offer a parade of horribles, suggesting that such a rule would allow "a candidate [to] stand within 500 feet of the polls and hand out $100 bills or half pints of whiskey to the voters as they enter the polling place." As the Appellant rightly responds, such actions would be conduct-not issue advocacy-and therefore would be regulable whether or not they occurred within 500 feet of a polling place. Indeed, many such actions would be covered by Kentucky's vote-buying statute. *See* KRS § 119.205 ("Any person who makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate or public question at an election shall be guilty of a Class D felony.")

Accordingly, because the statute is overbroad in that it prohibits speech over too much geography, and because, absent a narrowing construction it prohibits more speech than is necessary to meet the State's protected interest, the decision of the district court must be reversed.

IV.

WHETHER KENTUCKY'S DEFINITION OF "CONTRIBUTION" (KRS § 121A.010(11)) IS UNCONSTITUTIONAL ON ITS FACE

In addressing Appellant's numerous challenges to Kentucky's campaign finance statutes, we begin with a challenge to one of the fundamental terms in Kentucky's regulatory scheme: "contribution."

Kentucky's campaign finance statute defines "contribution" to include any "payment, distribution, loan,

deposit, or gift of money or other thing of value . . . ." KRS § 121A.010(11). This definition is broad, and on its face includes disbursements by candidates to their own campaigns. Indeed, other segments of Kentucky's statutory scheme rely upon this broad definition of contribution to indirectly regulate these internal disbursements. In *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998), this court addressed a challenge to KRS § 121A.030(5), which, with limited exceptions, prohibits a candidate from receiving a contribution within 28 days of an election. Because "contribution" included disbursements made by the candidate to his own campaign, the 28-day ban restricted the ability of a candidate to spend any money not already in the campaign coffers during the final 28 days. *Gable*, 142 F.3d at 944. In reviewing the statute, this court looked to *Buckley*, and noted that the Supreme Court "explicitly rejected a lower court's attempt to characterize 'the personal funds expended by the candidate on his own behalf as a contribution rather than an expenditure.'" *Id.* at 952 (citing *Buckley*, 424 U.S. at 52-53 n.58). This court therefore struck down the 28-day prohibition as applied to "internal" contributions, because the regulation, while using the term *contribution*, operated as an impermissible limitation on candidate *expenditures*. This distinction is of particular import because of the dichotomy *Buckley* recognized between contributions and expenditures. Candidate expenditures may not ordinarily be capped (except as a condition of participation in public funding program), because such ceilings "impose[ ] a substantial restraint on the ability of persons to engage in protected First Amendment expression." *Buckley*, 424 U.S. at 52.

This, however, is not the only place in which the regulatory scheme relies upon a definition of "contribution" to include candidate contributions. Kentucky offers 2-for-1 matching funds for those who participate in their public

funding program. Participating candidates must agree to limit their expenditures to $1.8 million. The statute also contains what is referred to as a trigger provision, which states that if a non-participating candidate receives more than $1.8 million in contributions-where contribution includes disbursements by the candidate to his own campaign-then the participating candidate is released from the expenditure ceiling, and may again receive 2-for-1 matching dollars.

Appellant challenges the definition of "contribution" here, arguing that the trigger deterred him from making expenditures. While the challenge is focused on how the term "contribution" is used in the context of the trigger, the broad definition is not found in the section of the code related to the trigger, but rather is given at KRS § 121A.010(11)(a) and applied throughout the regulatory scheme. Accordingly, for this court to apply a facial challenge to the term "contribution" only within the context of the trigger would require us to ignore the very structure of the statute. Therefore, we must examine whether the term "contribution," defined to include candidates' disbursements to their own campaigns, is facially constitutional. We conclude that it is not.

As this court noted in *Gable*, *Buckley* drew a line in the sand, and prohibited the government from restricting a candidate's ability to make expenditures on his own behalf. By defining contribution to include contributions by the candidate to his own committee, the statute runs the risk of limiting expenditures. While Kentucky avoids the brunt of this problem by exempting candidate contributions to their own campaigns from otherwise applicable contribution limits, the problem still exists in those sections of the code where candidate contributions to their own campaigns are not exempted from regulation. Thus, by failing to exempt

candidate contributions to their own campaigns from the trigger provision, Kentucky applies an indirect regulation on *expenditures*.

As tempting as it might be to offer a narrowing construction here, the language of the statute does not permit it. Unlike the definition of electioneering communication, which could be plausibly and facially read to apply only to express advocacy, the definition of contribution is not susceptible of a limited reading, and to save it would require this court to take out its blue pencil to add an exception--for candidates' contributions to their own campaign accounts--to the definition. This kind of modification is reserved for the legislature. It is for this court to decide whether the definition of contribution, written as it is, meets the requirements of the Constitution. Because Kentucky's definition of contribution includes what are candidate expenditures, and because this definition is relied upon by other segments of the regulatory scheme to indirectly limit candidate expenditures, the statute infringes upon constitutionally protected speech. Accordingly, the district court erred, and the definition of contribution in KRS § 121A.010 must be struck down.

V.

WHETHER KENTUCKY'S REQUIREMENT THAT CAMPAIGNS "TURN OVER" UNEXPENDED CONTRIBUTIONS AND FUND TRANSFERS TO THE COMMONWEALTH (KRS § 121A.080(6)) IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO A WRITE-IN SLATE OF CANDIDATES

Kentucky law requires disgorgement of campaign funds remaining in a campaign account after an election. Specifically, the relevant statute provides that:

> The unexpended balance of contributions and fund transfers in a candidate campaign account of a slate of candidates which remains after all financial obligations of the particular election for which the account is established have been satisfied shall be forwarded to the registry for deposit in the fund when the account is closed.

KRS § 121A.080(6). Appellant does not dispute that the statute may be applied to participants in the public financing program. Rather, Appellant argues that the statute (both facially and as applied) violates the First Amendment and the Takings Clause of the Fifth Amendment by implicating those campaign slates that do *not* participate in the public finance system.

In the trial court, Kentucky conceded that "if read as applicable to both participating and non-participating candidates, KRS § 121A.080(6) 'would create a host of constitutional problems.'" In order to avoid these problems, Kentucky urged the trial court to apply a form of the Canon

of Constitutional Avoidance, which states that if there are two permissible statutory interpretations, a court should choose the interpretation that will save the statute. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 190-91, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). The district court, relying on Kentucky's alternative reading, upheld the statute.

Appellees' alternative reading relies on the fact that the statute requires disgorgement of "the unexpended balance of contributions *and fund transfers* in a candidate campaign account of a slate of candidates." Registry Br. at 10 (quoting KRS § 121A.080(6) (emphasis added)). Emphasizing the phrase "*and* fund transfers," Appellees assert that "by its plain meaning, the statute contemplates an account with commingled funds, which include publicly financed, matching dollars." *Id.* at 10-11.

In order to succeed on the Constitutional Avoidance theory, the reading proffered must be permissible-that is, it cannot be contrary to the plain language of the statute. We think it is a strained reading indeed to find that the statute applies only to those candidate slates that have both unexpended contributions AND fund transfers. Rather, the natural and grammatical reading of the sentence is that BOTH types of funds are subject to disgorgement-whether the candidate has one or both types of funds in his account.

In addition to the natural and grammatical reading of the language, it is useful to look at the statute as a whole. Kentucky demonstrated that when it wished to specify participating or non-participating slates of candidates, it was capable of doing so with clarity. Indeed, just a few short lines above this subsection, the statute ably names both participating and non-participating slates with reasonable clarity:

> If the registry makes a finding of fact, after a public hearing of which all slates of candidates for Governor and Lieutenant Governor shall be notified, that in the course of a primary election, runoff primary election, or regular election campaign *a slate of candidates* for Governor and Lieutenant Governor *that has not accepted the provisions of this chapter* has received contributions or made expenditures in excess of the expenditure limit as provided in KRS 121A.030(1), the registry shall certify that those *slates of candidates that have elected to become eligible for fund transfers* or may in the future elect to become eligible for fund transfers shall be released from expenditure limitations
>
> . . . .

KRS § 121A.080(4)(a) (emphasis added). Thus, if the legislature intended the disgorgement provision to apply only to participating slates of candidates, reasonable rules of construction force us to presume that it would have specified "participating" slates as it did just a few sentences earlier. Because Kentucky's suggested reading of the statute does not comport with the plain language of the statute, the narrow but implausible reading proffered by the State cannot be relied upon under the Canon of Constitutional Avoidance.

Appellees alternatively assert that their interpretation of the statute is entitled to Chevron deference. Appellees, however, cite no case for the proposition that Chevron deference applies to *state* agency determinations. Chevron deference is predicated on the idea that legislative gaps serve as delegations from Congress to administrative agencies, whose determinations are given controlling weight unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed.

2d 694 (1984). In order to demonstrate that such deference is due to the Kentucky Registry of Election Finance, the agency must, at the very least, establish under Kentucky law that the legislature intends ambiguities or gaps to be treated as delegations to administrative agencies. The agency makes no attempt to do so, and accordingly any claim to *Chevron* deference must fail.

The Appellees then argue that the claim is not ripe, because the Registry has never sought to enforce the provision against Mr. Anderson or any non-participating slate of candidates. Appellees further assert that they would be precluded from enforcing the provision based upon their previous litigation posture, in which they argued that the provision does not apply to non-participating slates. Kentucky would appear to be correct insofar as Anderson brings the challenge as applied. However, Anderson also brings a facial challenge to the overbreadth of the act. Anderson rightly notes that facial challenges have been permitted even where the agency interpreted a provision in such a way as to preclude enforcement. Thus, in *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 388-90 (4th Cir. 2001) ("VSHL"), in a case involving a facially applicable regulation which had not been applied to its challengers, the Fourth Circuit found the case ripe because the agency had not promulgated a rule exempting the parties from the regulation. *Id.* Similarly, here there is no evidence that the Registry has issued such a regulation, and, notwithstanding its harkening to previous litigation posture, there is nothing to prevent Appellee from promulgating a policy *tomorrow* applying the statute to non-participating slates in future elections. Therefore, because a party may challenge a statute based upon the "assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression[,]" the facial

challenge is ripe for adjudication. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

Having disposed of Appellees' alternative arguments, we are left with a statute that Appellees concede suffers from a host of constitutional problems. It is clear that the disgorgement constitutes a *per se* taking for public use. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 123 S. Ct. 1406, 1418-1419, 155 L. Ed. 2d 376 (2003) (finding that a state's act of taking funds out of an IOLTA account would constitute a per se, rather than a regulatory taking). The Fifth Amendment to the United States Constitution therefore requires just compensation, which the State does not provide to those who do not participate in the public funding program. Therefore, the district court erred in finding the disgorgement provision facially constitutional.

VI.

WHETHER KENTUCKY'S BAN ON ALL POST-ELECTION CONTRIBUTIONS (KRS § 121.150(16)) IS CONSTITUTIONAL ON ITS FACE

KRS § 121.150(16) prohibits a candidate or his agents from soliciting or accepting contributions after the date of the general election. Relying in large part upon *Buckley*, the *McConnell* Court recently restated that contribution limits must be "closely drawn to match a sufficiently important [governmental] interest." *McConnell*, at 656 (internal quotations and citations omitted).

Kentucky asserts that the statute advances its interest in avoiding the appearance of *quid pro quo* corruption. Because *Buckley* recognized that avoiding corruption and the appearance of corruption is sufficient to justify limitations on

contributions, there is little doubt that Kentucky has met its burden of demonstrating a sufficiently important interest. *See Buckley*, 424 U.S. at 26-27.

The question then is whether the regulation is closely drawn to avoid an unnecessary abridgment of associational freedoms. On this point, the district court relied on *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), for the proposition that:

> post-election time limits . . . far more clearly address corruption and its appearance because the election has resolved the critical contingency of which candidate will hold office. We think this latter impact on associational rights is narrowly tailored to further compelling state interests.

Id. at 630. The reasoning of the court and of Appellees who rely on this argument appears to be that knowledge of the identity of the successful candidate creates a unique risk of corruption after an election-a unique risk that makes an absolute ban on post-election contributions narrowly tailored to prevent that appearance of corruption. Of course, this unique risk is a double-edged sword. While it may be that post-election contributions are more susceptible to the impression or appearance of corruption when those contributions are made to the *winning* candidate, the appearance of corruption all but disappears when that same contribution is made to a *losing* candidate.

Furthermore, the unique risk approach appears to be an attempt to apply the state interest analysis twice, and to skip over the closely drawn (or tailored) component of the *Buckley* analysis. Thus, to accept Appellees' argument is to find that the State has a sufficient state interest in preventing

corruption, and the State's actions are narrowly tailored because *ex post* election contributions are especially corrupting. But it is not the ban on making contributions after the election that effectively prevents this appearance of corruptions; it is Kentucky's $1,000 contribution limit. While a contribution to a winning candidate may be considered a "sure bet" after the election, the contribution cap prevents the late-comers from being perceived as obtaining or from actually obtaining any more influence than that which a pre-election contributor could muster from a maximum contribution.

In further support of the unique problem of post-election corruption theory, both the district court and Appellees cite to *Ferre v. State*, 478 So. 2d 1077 (Fla. Dist. Ct. App. 1985), in which that court warned that:

> if post-election contributions were allowed, a candidate could make large expenditures, secure in the knowledge that immediately after the election members of some currently unpopular group whose support for the candidate had not theretofore been disclosed would send in contributions to pay off the deficit. The result, of course, would be that voters may have been deceived into voting for a candidate with allegiances, or at least bedfellows, with which they violently disagree.

478 So.2d at 1080 n.10. While disclosure does have a signaling effect, *see Buckley*, 424 U.S. at 67 (noting that "the sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive"), *Ferre* overstates the concern, at least as it might apply here. Because Kentucky has a statute capping the amount that any contributor may give to a candidate, concerns

about a donor "purchasing" undue influence are substantially mitigated.

Accordingly, because the post-election restriction is not closely drawn, but rather impinges on associational rights even where there is little risk of corruption following an election, the decision of the district court is reversed on this question.

VII.

WHETHER KENTUCKY'S BAN ON CASH CONTRIBUTIONS (KRS § 121A.050(2)) IS CONSTITUTIONAL AS APPLIED

Pursuant to KRS § 121A.050(2), Kentucky prohibits any cash contributions to gubernatorial candidates. In an Advisory Opinion issued to Anderson, the Registry clarified that the restriction applied to candidates who do not participate in the public funding scheme, and that campaign paraphernalia purchased from the campaign constitutes a contribution for purposes of the act. Accordingly, candidates in Kentucky are prohibited from selling a campaign button or a bumper sticker for one dollar-or less-without receiving the purchase/contribution price for the item in the form of an negotiable instrument which identifies both the donor and recipient.

The district court recognized, and the Registry concedes, that this cash prohibition is essentially a disclosure requirement. Relying on *Buckley*'s determination that the disclosure requirements of the federal act were constitutional, the district court upheld Kentucky's provision.

Buckley requires that disclosure requirements be subjected to "exacting scrutiny" because of the "significant encroachment on First Amendment rights . . . that compelled disclosure imposes . . . ." *See Buckley*, 424 U.S. at 64. Placing significant weight on a recent decision of this court which held that a provision of Akron's prohibition of cash contributions in excess of $25 did not impose an undue burden on the right of association, *see Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002), Appellees argue that Kentucky's disclosure requirement in the form of a prohibition on all cash contributions survives this exacting scrutiny. The *Frank* Court found that the Act's requirement that modes of payment identify the contributor did not burden the right to associate, and further declared that "the provision serves the significant governmental interest of accountability by forcing contributions to be traceable." *Id.* at 819.

While Appellees suggest that *Frank* disposes of this question, such a finding would ignore the difference between the $25 dollar limitation at issue there, and the first penny requirement at issue here. While this may at first glance appear to be a difference in degree and not in kind, it is clear that Kentucky's regulation cannot survive exacting scrutiny because it is not "closely drawn" to avoid unnecessary abridgment of associational freedoms. *Buckley*, 424 U.S. at 25. The State's ban on *all* cash contributions effectively forecloses speech by a large body of individuals who will be chilled from making a *de minimis* contribution. While the parties do not flesh this argument out, we think that as a matter of common sense, a contributor will be substantially less willing-or able-to use a negotiable instrument to make a purchase or contribution of, say, $5 or less than to use such a financial instrument to make a purchase of $25 or more. *See, e.g., Fior D'Italia, Inc. v. United States*, 242 F.3d 844, 846 (9th Cir. 2001), *rev'd on other grounds*, *Fior D'Italia,*

Inc. v. United States, 536 U.S. 238, 153 L. Ed. 2d 280, 122 S. Ct. 2117 (2002) (noting that experience demonstrates that consumer spending habits differ based on whether the transaction is conducted in credit or cash). Thus, to the extent that Kentucky's interest in preventing corruption descends to the smallest contributions, the State could have easily promoted disclosure by requiring the campaigns to take the name of the person making the contribution.(3)

The *Buckley* decision itself is instructive of how a statute may be more closely tailored to the end of providing disclosure. The federal statute at issue in *Buckley* established a two-tier disclosure system, in which campaigns were required to record the names and addresses of those who contributed more than $10, and were required to report to the FEC contributions exceeding $100 in a calendar year. *Buckley*, 424 U.S. at 82.[4] By relying on reporting for even small amounts, rather than a ban on the use of cash, the federal statute provided for disclosure without placing undue burdens on those who wish to associate.

Because the Kentucky statute is not closely drawn to avoid unnecessary abridgment of associational freedoms, we must reverse the district court's judgment finding the prohibition on cash contributions constitutional.

---

[4] In upholding the disclosure requirements, the Buckley Court relied upon the fact that there was not public disclosure of contributions between $10 and $100 to avoid reaching the question of whether mandatory public disclosure of so small an amount would "trespass[ ] impermissibly on First Amendment rights." *Id.* at 84.

VIII.

WHETHER KENTUCKY'S PROHIBITION ON A CANDIDATE'S LOANING HIS CAMPAIGN MORE THAN $50,000 (KRS § 121.150(13) & (21)) IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED

Kentucky prohibits candidates from loaning their respective campaigns more than $50,000 in a given election. KRS § 121.150(13). Anderson challenged this provision as being akin to an unconstitutional restriction on candidate expenditures.

We conclude that loans are candidate expenditures, unless and until they are repaid. Kentucky law defines the term "contribution" to include any loan given to a committee. KRS § 121A.010(11)(a)(1). Under *Buckley*, a contribution made by the candidate on his own behalf is an expenditure. *See*, e.g., *Gable*, 142 F.3d at 951 (treating the limitation on internal contributions during the 28-day window as a limitation on candidate expenditures). As a matter of campaign finance law, therefore, limitations on candidate loans are limitations on campaign expenditures, and limitations on campaign expenditures are prohibited by *Buckley*.

The district court rejected the view that loans to campaigns should be treated as expenditures. First, the district court cited to the concern that repayment after the election creates unique risks of *quid pro quo* corruption. As we have already found, however, the risk of *quid pro quo* is substantially mitigated by individual contribution limits. *See supra*, section VI. Furthermore, the risk of *quid pro quo* is virtually non-existent where the contribution is made to a losing candidate who seeks to recoup some of his debt.

Finally, if the risks of after-election repayment are substantial enough to justify regulation, the court must determine whether these particular regulations, that is, the loan limitation and the flat prohibition on post-election contributions combined, are closely drawn to address the risk of corruption.

The district court then adopted the reasoning of *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995), which previously upheld the $50,000 loan ban. The *Wilkinson* Court found two distinct compelling interests: combating the appearance that a "contributor is lining the candidate's pockets" by contributing after the election, and removing "the appearance that heavily indebted candidates are easy bedfellows for *quid pro quo* contributors." *Wilkinson*, 876 F. Supp. at 930-31.

Wilkinson's first compelling interest-combating the appearance of a contributor's lining a candidate's pocket-is simply a variation on the post-election contribution issue raised above. We note that while a state does have the ability to regulate in order to combat the appearance of corruption, that appearance must be reasonable. To hold otherwise would be to give unreasonable perceptions of corruption the equivalent of a heckler's veto. The perception that contributions to campaigns, which in turn repay loans to candidates, in some way "line the pockets" of candidates is simply not reasonable, and should not be used as a basis for regulation.

Wilkinson's second compelling interest-removing the appearance that heavily indebted candidates are easy bedfellows for *quid pro quo* corruption-is once again addressed by the contribution limits. If a $1000 contribution has been found by the Kentucky legislature to be sufficiently

low to avoid the appearance or fact of corruption, then a $1000 contribution to a campaign that is indebted to the candidate should also be found to be non-corrupting. While the candidate may have a greater vested interest in assuring that an unsecured loan from his personal coffers gets repaid, the application of Kentucky's contribution limits means that no individual donor can give enough to be considered corrupting or "apparently" corrupting.

Finally, restrictions on loans are particularly onerous because they limit when a party can speak (or how much he can say at a given time). The exigencies of a campaign may require that a candidate spend more early to raise name recognition, or to address an issue of public concern prior to contributions arriving. Indeed, a candidate may need to speak early in order to establish her position and garner contributions. The $50,000 ceiling on loans, while not insubstantial, does significantly impinge upon a candidate's ability to deliver and to time his or her message. We must therefore reverse the district court's judgment concerning the constitutionality of campaign loan limits.

IX.

WHETHER KENTUCKY'S PROHIBITION OF CONTRIBUTIONS DURING THE FINAL 28 DAYS BEFORE THE REGULAR ELECTION (KRS §§ 121.150(24) & 121A.030(5)) IS CONSTITUTIONAL AS APPLIED

Pursuant to KRS §§ 121.150(24) & 121A.030(5), a candidate is prohibited from receiving contributions in the final 28 days preceding an election, whether the candidate is participating in the public finance scheme or not. Mr.

Anderson challenges the applicability of this provision to write-in candidates.

The district court and Appellees assert that this issue is controlled by *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998). In *Gable*, this court examined whether non-participating candidates could be subjected to the 28-day restriction. While the *Gable* court struck down the restrictions on internal contributions (self-financing) during this time period, the court nonetheless upheld the restriction on external contributions during the final 28 days, even as applied to candidates who do not participate in the public finance scheme. *Id.* at 951. First, the court recognized that the 28-day requirement is an important part of Kentucky's campaign finance scheme. *Id.* at 950. The court relied upon Kentucky's statements that the 28-day restriction is necessary in order to ensure that all contributions are made before the final pre-election reporting date, so that "if a non-participating slate has exceeded the $1.8 million threshold, the Registry can detect it in time to activate the Trigger." *Id.* at 949-50. Under the Kentucky campaign finance law, contributions to a participating candidate's campaign are capped at $600,000 (which, with matching public funds equals $1.8 million). The lifting of this contribution cap is "triggered" by a non-participating candidate's receiving an excess of $1.8 million in contributions. *Id.* at 947. Kentucky argued in *Gable* that the 28-day window is necessary for the effective operation of the trigger; the trigger provision is an incentive for candidates to participate in the public financing scheme; and the purpose of the public financing scheme is to prevent actual and apparent corruption. Therefore, the State contended application of the 28-day window to non-participating candidates is justified by Kentucky's interest in preventing corruption. This court agreed. *Id.* at 951.

Here, Anderson challenges the application of the 28-day window to write-in candidates. He attempts to distinguish *Gable* because write-in candidates are ineligible to participate in the funding scheme, and therefore the 28-day window 40 cannot advance the State's purpose in inducing participation in the public funding program. The district court found this attempt to distinguish the holding in *Gable* to be a "distinction without a difference." But the district court paints with too broad a brush. The *Gable* court found that the 28-day window was permissible as applied to non-participating candidates because it advanced Kentucky's interest in combating corruption. *Gable*, 142 F.3d at 951. The *Gable* court did not specifically address those candidates who are non-participating because they are ineligible for funding under the act-that is, write-in candidates. While the opinion itself may appear at first blush to be broad enough to encompass both voluntary and involuntary non-participants, *Gable*'s reasoning supports the application of the 28-day window only to voluntary non-participants.

Under the *ratio decidendi* of *Gable*, the 28-day window contributes to Kentucky's scheme to combat corruption, but only insofar as it supports the trigger, which in turn channels individuals into the corruption-reducing public finance scheme. Under KRS § 121A, however, write-in candidates are not eligible to participate in that scheme, and therefore cannot be channeled into the public finance system. Therefore applying the 28-day window to write-in candidates simply cannot be intended to combat corruption by channeling write-in candidates into the public finance scheme.

The only remaining question then is whether exempting write-in candidates from the 28-day requirement would impair the incentives for other candidates to participate in the public finance scheme, and thereby undermine the Kentucky

statutory framework designed to combat corruption. The public finance program caps contributions to a candidate's campaign at $600,000, and provides matching funds for those dollars on a two-for-one basis. The contribution cap will be lifted at any time (until the final report date which is 28 days before the election) that the non-participating candidate collects more than $1.8 million. If the 28-day window were not applicable to write-in candidates, a candidate eligible for public funding would have an incentive not to participate in the public finance program only if she had reason to believe that a write-in candidate would fail to collect more than $1.8 million before the 28-day window closed, but would substantially outstrip her in contributions in the final 28 days. This is a highly unlikely scenario at best. To the extent that a write-in candidate could raise such last-minute money, those funds would most likely be internal contributions--that is, contributions made by the candidate himself--and this court's decision in *Gable* clarified that internal contributions are not subject to the 28-day window. Accordingly, we see no reasonable likelihood that exempting write-in candidates would have a negative impact on candidate participation in the program. The 28-day window, as applied to write-in candidates, therefore does not serve the government's purported purpose in combating corruption.

But the 28-day window does unnecessarily abridge associational freedom. As the Supreme Court has noted in *McIntyre v. Ohio Election Com'n*, the fact that speech occurs during the heat of an election "only strengthens the protection afforded" under the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995). Because write-in candidates are less likely to have substantial name recognition or large bases of support, restricting their ability to receive contributions during the vital 28 days preceding an election constitutes a

substantial burden on the associational rights of both the candidate and her would-be supporters. The district court therefore erred in holding that the application of the 28-day window to write-in candidates is constitutional.

X.

WHETHER KENTUCKY'S PUBLIC FINANCE OPTION (KRS 121A) DOES NOT PROVIDE BENEFITS ON A DISCRIMINATORY BASIS IN VIOLATION OF THE CONSTITUTION

Under the provisions of KRS 121A, a write-in candidate is not entitled to matching funds. Anderson challenges this provision as a violation of the Equal Protection Clause. As the district court noted below, Equal Protection challenges to public funding schemes are not unique, as demonstrated by the fact that the *Buckley* Court entertained an Equal Protection challenge to access to the federal public finance system.

The language in *Buckley* concerning the inability of a minor candidate to succeed in challenging a public funding scheme on Equal Protection grounds is sweeping, and suggests a low probability of success for such a claim. For example, the *Buckley* Court found that "Congress' interest in not funding hopeless candidacies with large sums of public money . . . necessarily justifies the withholding of public assistance from candidates without significant public support." *Buckley*, 424 U.S. at 96. The Court then found that eligibility requirements also served the public interest "against providing artificial incentives to 'splintered parties and unrestrained factionalism.'" *Id.* (citation omitted).

The *Buckley* Court concluded that Equal Protection claims seeking access to public financing are at base claims of the

"denial of the enhancement of opportunity to communicate with the electorate that the formulae afford eligible candidates." *Id.* at 95. However, because the Court found that ineligible candidates are not subject to expenditure limitations applied to those in the public finance system, the Court found that those denied access were not "unfairly or unnecessarily burdened." *Id.* at 95-96.

In applying *Buckley* to Kentucky's categorical exclusion of write-in candidates from public-funding eligibility, the district court was "not unmindful that the instant action presents a significant twist on the *Buckley* equal protection analysis, a distinction that may, indeed, be said to inch the Commonwealth's scheme in the direction of invidious discrimination." Specifically, because of the operation of the "trigger" (which releases participants from spending caps once non-participating candidates have raised $1.8 million), participants in the public financing scheme are not necessarily burdened by an expenditure cap any more than are those candidates who are ineligible to participate in the program. Accordingly, *Buckley*'s rationale that ineligible candidates are not unfairly burdened because they are not subject to the additional expenditure restrictions concomitant with the public finance program is inapplicable. The district court nonetheless and without discussion found that the difference was not significant enough to require a different result from that which occurred in *Buckley*, and therefore upheld the program.

While this is a close question given that under Kentucky's scheme, write-in candidates are given all the burdens and participating candidates all the benefits, we conclude that the district court did not err in finding that the program can survive on Equal Protection grounds post-*Buckley*. Specifically, Kentucky's interest in maintaining and managing scarce resources and, as *Buckley* put it, in "not funding

hopeless candidacies with . . . public money," is a significant government interest that justifies access requirements for the fund. *See Buckley*, 424 U.S. at 96. Accordingly, while *Buckley* is certainly distinguishable insofar as the program here does not balance the burdens among participants and non-participants, the government interest in maintaining scarce resources allows it to treat differently situated candidates differently without running afoul of the Fourteenth Amendment's Equal Protection clause. We therefore affirm the decision of the district court on this question.

XI.

WHETHER KENTUCKY'S TRIGGER PROVISIONS ARE CONSTITUTIONAL AS APPLIED

As previously described, Kentucky's trigger provision lifts the contribution cap for candidates participating in the public finance system, and eliminates the 28-day window restricting contributions for all candidates. KRS § 121A.030(5)(a).

Anderson challenges the trigger as excessively coercive. The *Gable* Court found that the trigger is not excessively coercive, and this panel is bound by that decision. *See Gable*, 142 F.3d at 949. Anderson also challenges the trigger as applied, suggesting that it is particularly onerous to write-in candidates who are not permitted to participate in the public finance system. Because this argument is essentially a recasting of the Equal Protection claim made in question X, it must fail for the same reason. We therefore affirm the judgment of the district court upholding the constitutionality of the trigger provision as applied.

XII.

For the foregoing reasons, the decision of the district court is REVERSED as to those claims addressed by this court in sections III-IX, and AFFIRMED as to those claims addressed in sections X-XI. The case is remanded for further proceedings consistent with this order.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY,
ASHLAND DIVISION

CIVIL ACTION NO. 99-189-JMH

[Filed March 21, 2002]

HOBART WARD ANDERSON, ET AL., PLAINTIFFS,	)
v.	)
LLOYD E. SPEAR, IN HIS OFFICIAL CAPACITY AS COMMONWEALTH ATTORNEY FOR GREENUP COUNTY, KENTUCKY, AND AS REPRESENTATIVE OF THE CLASS OF COMMONWEALTH ATTORNEYS IN THE COMMONWEALTH OF KENTUCKY, ET AL., DEFENDANTS.	)

JUDGES: JOSEPH M. HOOD, JUDGE.

MEMORANDUM OPINION AND ORDER

I. Introduction

This case presents a challenge to various provisions of the Commonwealth of Kentucky's election and campaign finance regulatory scheme. Plaintiffs Hobart Ward Anderson and Hoby for the Commonwealth (a write-in candidate for governor in 1999 and his campaign committee, respectively) bring what amounts to a ten-fold assault on Kentucky's statutory scheme of electoral and campaign finance regulation. Specifically, plaintiffs challenge the following provisions: (1) KRS § 117.235(3) (prohibiting "electioneering" within 500 feet of polling stations),[1] (2) KRS § 121A.080(6) (requiring unexpended campaign funds to be turned over to the Commonwealth), (3) KRS § 121.150(16) (prohibiting post-election solicitation and acceptance of contributions), (4) KRS § 121A.050(2) (prohibiting cash contributions), (5) KRS §§ 121.150(13)-(20) (limiting loans of personal funds by a candidate to his or her campaign to $50,000), (6) KRS § 121.150(23) and KRS § 121A.030(5) (prohibiting solicitation and acceptance of contributions during the final twenty-eight (28) days before a general election), (7) KRS § 121A (Kentucky's public campaign finance scheme generally), (8) KRS § 121A.080(4)-(5) (permitting candidates receiving public financing to exceed the statutory contribution cap should other candidates themselves exceed the cap), and (9) KRS § 121A.010(11) (defining "contribution" to include donation of a candidate's own personal funds). Plaintiffs allege that these statutory provisions impermissibly burden the constitutional guarantees of free speech and association, offend due process of law, and produce unconstitutional "takings." Plaintiffs' challenges are

---

[1] Hereinafter, this provision is referred to as "the 500-foot electioneering ban," or simply "the electioneering ban."

thus grounded in the First, Fifth, and Fourteenth Amendments of the United States Constitution.

Plaintiffs challenge two aspects of this provision. Plaintiffs' first argument addresses the length of the ban-radius; plaintiffs' second argument addresses the propriety of the attorney general's classification of plaintiff Anderson's instruction cards (cards providing information to voters as to how properly to complete a write-in ballot) as "electioneering" and thus subject to the 500-foot ban. Because plaintiffs' brief addresses each provision separately and under a different "count", the Court preserves this organizational structure for the sake of clarity. Thus, though only nine individual statutes are involved, plaintiffs' dual challenge to KRS § 117.235 makes for ten (10) distinct and individual challenges.

This matter has been submitted on cross-motions for summary judgment. The parties concede that there exist no factual disputes, and that all issues presented are strictly

question of law.[2] The legal issues fully briefed,[3] this matter is ripe for review.

---

[2] In their briefs, defendants attempt to raise (albeit half-heartedly) issues of both standing and ripeness. These arguments are without merit. As to standing, plaintiffs have evidenced actual injury caused by the challenged statutory provisions and redressable by a favorable ruling by this Court. Thus plaintiffs have met the tripartite requirements for standing. *See Grendell v. The Ohio Supreme Court*, 252 F.3d 828, 832 (6th Cir. 2001). As for ripeness, passage of the 1999 gubernatorial election does not render this controversy unmaintainable, as the instant action qualifies under either the "collateral consequences" or "capable of repetition yet evading review" exception to the mootness doctrine. For a description of the "collateral consequences" exception, see *Sibron v. New York*, 392 U.S. 40, 53, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). For a description of the "capable of repetition yet evading review" exception, see *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

[3] It is helpful to note that defendants have submitted separate briefs. Counts I and II (the overbreath and vagueness challenges to KRS § 117.235, the 500-foot electioneering ban) are applicable to the Board of Elections (the "Board defendants") - the state body charged with enforcing the 500-foot electioneering ban. Counts III-X are applicable to Kentucky's Registry of Election Finance (the "Registry defendants"), the state body charged with oversight of Kentucky's campaign finance provisions.

II. Analysis

A. Board of Election Defendants - Counts I and II

Counts I and II of plaintiffs' motion for summary judgment address KRS § 117.235.[4] Plaintiffs challenge this statute both facially and as applied. Plaintiffs' challenge to KRS § 117.235 is two-fold: plaintiffs allege that this statute is overbroad or, in the alternative, void for vagueness. The allegation of overbreath amounts to a two-pronged charge that (1) the 500-foot electioneering ban is unconstitutionally expansive, or, in the alternative, (2) the statute, in addition to prohibiting "express advocacy," impermissibly prohibits "issue advocacy." Plaintiffs' vagueness averment is grounded in the assertion that the statute does not provide "fair notice" of the proscribed illegal conduct. Plaintiffs' alternative arguments are herein considered in turn.

---

[4] The challenged portion of KRS § 117.235 is subsection (3), which reads in part:

> (3) No person shall ... do any electioneering at the polling place or within a distance of five hundred (500) feet of a county clerk's office or any entrance to a building in which a voting machine is located... Electioneering shall include the displaying of signs, the distribution of campaign literature, cards, or handbills, the soliciting of signatures to any petition, or the solicitation of votes for or against any candidate or question on the ballot in any manner, but shall not include exit polling. Nothing contained in this section shall prohibit electioneering conducted within a private residence or establishment other than that in which the polling place is located by persons having an ownership interest in such property.

1. Overbreath

In claiming that KRS § 117.235 is unconstitutionally overbroad, plaintiffs advance two arguments. The first - and the only one with precedential justification - amounts to an assertion that the statute's ban on "electioneering" within 500 feet of polling places is, in terms of sheer length, far too expansive. Plaintiffs in this regard rely on the United States Supreme Court's ruling in *Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992), a decision strongly implying (but not specifying) the existence of some constitutional limitations on the length of such electioneering bans. Plaintiffs' second overbreath argument amounts to an assertion that, in addition to banning (permissibly) "express advocacy," the statute goes too far in banning "issue advocacy." This second argument is derived from the Supreme Court's holding in *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), a decision involving not electioneering bans but campaign finance restrictions. In this sense plaintiffs' second argument appears wholly novel.

a. The 500-foot electioneering ban

All agree that the constitutional question presented by Kentucky's 500-foot electioneering ban is controlled by the Supreme Court's ruling in *Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992). There, in a highly-fractured opinion, a mere plurality of the Court upheld a Tennessee statute prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of polling stations.

In *Burson*, the Court began by noting that, as a content-based restriction on political speech in a public forum, [the Tennessee statute] would be subjected to "exacting" scrutiny.

Id. at 197. The Court went on to specify that this "exacting" scrutiny meant that Tennessee had to show that the regulation was "necessary to serve a compelling state interest and ... [was] narrowly drawn to achieve that end." *Id.* (quoting *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983)). Having set forth the proper standard of review, the Court acknowledged, however, that this standard - seemingly quite clear - was often quite difficult to apply. As the Court noted:

> Despite the ritualistic ease with which we state this now-familiar standard, its announcement does not allow us to avoid the truly difficult issues involving the First Amendment. Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with out commitment to other constitutional rights embodied in government proceedings... [Cases involving "electioneering" bans] present[] us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote - a right at the heart of our democracy.

Id. 504 U.S. at 198 (citations omitted).

Having identified the appropriate legal standard (and having noted the the difficulty of its application), the Court endeavored to apply this standard to the Tennessee statute before it. The Court first addressed the question whether Tennessee could, in fact, demonstrate that Tennessee's 100-foot restriction served any "compelling" interests. The Court found two: (1) protecting the right of citizens to vote freely for the candidates of their choice, and (2) protecting the right to vote in an election conducted with integrity and reliability.

Id. These interests, the Court found, were "obviously" compelling. *Id.* 504 U.S. at 199.

The Court noted, however, that more was required then a mere demonstration of compelling interests. Indeed, a showing of "necessity" was also required. In the Court's words, "to survive strict scrutiny ... a State must do more than assert a compelling state interest - it must demonstrate that its law is necessary to serve the asserted interest." *Id.* The Court went on to examine the "necessity" of Tennessee's 100-foot ban, in the process rejecting the arguments that (1) the same interests could be served without so burdening First Amendment freedoms by statutes directly regulating the prohibited conduct (i.e. making it illegal to interfere with an election, or to use violence or intimidation to prevent voting),[5] and (2) the statute was under-inclusive, in that it failed to ban *all* political speech (such as exit polling) within the ban radius. *Id.* 504 U.S. at 206-08. In the final analysis, the Court found that the question of necessity and narrow tailoring required examination of the "real question": *"How large a restricted zone is permissible or sufficiently tailored?"* *Id.* 504 U.S. at 208.

The Court, however, declined to answer its own question. Instead, the Court simply stated that "it is sufficient to say that in establishing a 100-foot boundary, Tennessee is on the constitutional side of the line." *Id.* 504 U.S. at 210. The

---

[5] Plaintiffs in the instant action rely heavily on such arguments. But there is no merit therein. Wrote the *Burson* Court: "Intimidation and interference laws *fall far short* of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." *Id.* 504 U.S. at 206-07 (emphasis added) (quoting *Buckley v. Valeo*, 424 U.S. 1, 28, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)).

Court indicated that, while it is true that "at some measurable distance from the polls ... governmental regulation of vote solicitation could effectively become an impermissible burden," there exists no judicial magic formula or "litmus-paper test that will separate valid from invalid restrictions." *Id.* 504 U.S. at 210-11 (quotations and citations omitted).

It is in this context of imprecision that this Court in the instant action endeavors to pass upon the constitutionality of Kentucky's 500-foot electioneering ban. *Burson* makes clear that a state may constitutionally restrict election-day campaigning within 100 feet of polling stations. But what of a 500-foot restriction? This is the question of first impression presented by the instant action.

Given the absence of a "litmus-paper test" - or, for that matter, any test - this Court readily admits that its reasoning is less than scientific. The Court perceives the question as such: given the constitutional compromise between free speech and fair elections struck in *Burson*, does the extension of the speech restriction from 100 to 500 feet upset the constitutional balance?

In considering the question, the Court first notes that Kentucky has asserted the very same interests recognized as "compelling" by the *Burson* plurality. There is, then, no question on this point. But what of "necessity?" Is the 500-foot ban "narrowly tailored?" The constitutionality of KRS § 117.235 would seem to turn on the answer to this question.

Upon careful consideration, the Court finds that Kentucky's ban on electioneering within 500 feet of polling stations *is*, in fact, both necessary and narrowly tailored. In coming to this conclusion, the Court places great weight on the demonstrated and undeniable past failure of a less

restrictive ban, on the painstakingly deliberate and lengthy process by which the 500-foot ban came into existence, and on general principles of federalism and appropriate deference to legislative enactments.

Of these indicia of constitutional "necessity," the patent failure of Kentucky's original (and less-restrictive) ban is perhaps the best evidence of the necessity of the Commonwealth's present (and more expansive) 500-foot restriction. By all accounts, the former electioneering ban - limited to fifty (50) feet - had proven thoroughly ineffectual. The record is replete with testimony to this effect, and even plaintiffs do not dispute that something more was needed.

Further evidence of the necessity and narrow tailoring of the Commonwealth's 500-foot ban is found in the deliberative process by which the restriction came into existence. Close inspection reveals that the 500-foot radius length was agreed-upon only after careful study, discussion, and debate. In this respect the history of the 500-foot restriction is highly instructive.

Indeed, from the record it may be inferred that the Commonwealth's 500-foot ban is traceable to a 1987 series of articles published by the Louisville Courier-Journal detailing the full breath and scope of fraud and corruption in Kentucky's electoral system. From the record it appears that the Courier-Journal series gave rise to public outcry, from which arose a task force on election fraud assembled by then-Attorney General Fred Cowan and chaired by Louisville attorney Hiram Ely. The work of Attorney General Cowan's task force was supplemented by a special commission created by Kentucky's Legislative Research Commission. The Attorney General's task force and the Legislative Research Commission issued their first reports in January 1988.

Both reports arrived at the same conclusions. Generally, both the task force and the Legislative Research Commission reported rampant corruption in Kentucky's electoral system. Specifically, both reports found that such corruption was directly linked to electioneers' ability to ply their trade in close proximity to the polling stations. Both reports further found that the then-existing 50-foot ban was wholly inadequate in protecting voters from electioneers' improper influence and vote-solicitation. [Task Report Report, pp. 44-45; Special Commission First Interim Report at 19; Deposition of Hiram Ely, at 25].

Having studied the problem (corruption) and having identified the source (vote-buying), both the task force and the Special Commission went on to consider potential solutions. In this respect, both the Task Force and the Special Commission recommended that the 50-foot ban be expanded. The Task Force recommended a 1000-foot ban, the Special Commission a 500-foot ban. When representatives of both bodies subsequently met to formulate joint recommendations to present to Kentucky's general assembly, the parties elected to adopt the Task Force's 1000-foot ban. Ultimately, however, the 1000-foot ban was reduced in the course of the legislative process to a 500-foot restriction. The 500-foot electioneering ban became law when the Governor signed the Omnibus Election Reform Bill, of which the 500-foot electioneering ban was a part.

The Court notes the origin of KRS § 117.235 not to provide historical context, but rather to make clear the deliberate, considered manner by which the 500-foot ban came into existence. The situation presented by the instant action does not call for the Court to pass upon a constitutional free speech/fair election compromise hastily-arranged or reflexive - to the contrary, the history of Kentucky's 500-foot

ban reveals it to be the product of both executive and legislative investigation, discussion, and debate. Simply put, the point is that the extensive scrutiny to which the restriction was naturally subject through the course of its enaction is further evidence of the provision's necessity and narrow tailoring.

Finally, the Court is mindful of established principles of federalism, and of the doctrine of separation of powers. While recognizing that "at some measurable distance ... [Kentucky's] regulation of vote solicitation could effectively become an impermissible burden," *Burson*, 504 U.S. at 210, the Court believes that, as to the question of necessity, the legislature should be afforded at least a minimal degree of deference. *Burson* makes clear that a ban of *some* length may constitutionally exist; as the branch of government closest to the populace, the legislature is in the best position to determine the precise coordinates. It is enough for this Court to find that the Commonwealth's 500-foot ban is necessary, and that the ban does not extend beyond *Burson's* constitutional "measurable distance." Whether 100, 200, or 300 feet - this is a question for the General Assembly, not this Court.

For the reasons outlined above, then, the Court finds the Commonwealth's 500-foot electioneering ban to be both necessary and narrowly tailored. Because the restriction is necessary and narrowly tailored, and because the ban serves recognized and compelling state interests, the restriction survives "strict scrutiny" review. In short, Kentucky's prohibition on electioneering within 500 feet of polling stations strikes a constitutionally permissible compromise

between the competing interests of free speech and fair elections. Plaintiffs' challenge fails.[6]

b. "Express" versus "Issue" Advocacy

Plaintiffs' second overbreath argument appears wholly novel. Specifically, plaintiffs rely on the seminal *campaign finance decision Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L.

---

[6] In upholding KRS § 117.235, the Court declines to follow, to the (limited) extent that it is apposite, the holding of the Eastern District of Wisconsin in *Calchera v. Procarione*, 805 F. Supp. 716 (E.D. Wis. 1992). There, the court struck down Wisconsin's own 500-foot electioneering ban. In finding Wisconsin's ban unconstitutional, the Eastern District deemed persuasive Justice Stevens's dissent in *Burson*, wherein Justice Stevens cites Wisconsin's and Kentucky's 500-foot bans as apparent paradigms of unconstitutionally overbroad restrictions. *Burson*, 504 U.S. at 218 ("In some States, such as Kentucky and Wisconsin, the radius of the restricted zone is 500 feet - silencing an area of over 750,000 square fee. Even under the most sanguine scenario of participatory democracy, it is difficult to imagine voter turnout so complete as to require [such an expansive ban].").

This Court finds *Calchera* unpersuasive (if not outright inapplicable) for two principal reasons. First, and most significantly, the Wisconsin statute - unlike its Kentucky analog at issue in the instant action - did not contain an exception for private property. In finding the Wisconsin statute overbroad, the *Calchera* court relied heavily on this aspect of the restriction, noting that the statute, "with its sweeping zone of protection, prohibited individual homeowners from expressing their political views *on their own property.*" *Calchera*, 805 F. Supp. at 720. In contrast to its legally-deceased Wisconsin counterpart, KRS § 117.235 specifically exempts private property. Second, unlike Kentucky in the instant action, Wisconsin in *Calchera* declined to defend the challenged ban.

Ed. 2d 659 (1976), wherein the United States Supreme Court distinguished "express" and "issue" advocacy, finding that the former but not the latter could be regulated constitutionally. In effect, plaintiffs ask this Court to borrow the express/issue advocacy dichotomy from the campaign finance context and to apply it in this, the election-regulation (Burson-type) context. More specifically, plaintiffs' argument proceeds as follows: because under *Buckley* "issue" advocacy cannot be regulated, and because KRS § 117.235 makes no exception for "issue advocacy" (the provision prohibits *all* forms of electioneering within the 500-foot radius), the statute is overbroad and therefore unconstitutional.

As a matter of simple logic, the Court concedes a degree of intuitive appeal. Indeed, plaintiffs should be credited with unearthing the subtle tension between *Burson* (finding constitutional Tennessee's 100-foot campaign-free zone - a statutory restriction applicable to both "express" and "issue" advocacy) and *Buckley* (finding "issue" advocacy in all instances not subject to constitutional regulation).

The fact remains, however, that the Court decided *Burson* some sixteen (16) years after *Buckley*. The *Burson* Court, then, either overlooked *Buckley* or, on the other hand, simply found it inapplicable. This Court finds that the former scenario is highly unlikely; *Buckley*, after all, is the seminal campaign finance decision. Rather, the logical inference is that the *Burson* Court, faced with an issue relating not to campaign finance, but rather to election regulation (specifically, the constitutionality of Tennessee's 100-foot restriction), found *Buckley* inapposite.

In other words, *Buckley's* express/issue advocacy terminology lacks currency outside the campaign finance context. To the knowledge of this Court, the express/issue

advocacy distinction has never before been applied in the election regulation context. Though not without merit, the argument must fail on account of its nonexistent precedential foundation. For this reason and for the reasons outlined above, plaintiffs' argument that KRS § 117.235 is overbroad because it prohibits both "express" and "issue" advocacy is rejected.

2. Vagueness

The challenged provision is not vague. The Court finds as a matter of law that the definition of "electioneering" contained in KRS § 117.235(3) provides fair notice of what conduct is prohibited. That the statute contains a scienter requirement is additional evidence that the statute is not unconstitutionally vague.[7] *Hill v. Colorado*, 530 U.S. 703, 147 L. Ed. 2d 597, 120 S. Ct. 2480 (2000). Certainly it cannot be said that the statute is so vague or standardless as to rise to the level of a due process violation. *See City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999).

---

[7] KRS § 117.995(6) amounts to a notification provision. It provides that a person cannot be convicted of violating KRS § 117.235 unless the violation occurs "after [the person] has been duly notified of the provisions by any precinct election officer, county clerk, deputy county clerk, or other law enforcement official."

B. Registry of Election Finance Defendants ("Registry Defendants") - Counts III - X

1. Count III - Plaintiffs' Challenge to KRS § 121A.080(6) (Kentucky's so-called "turn-over" provision)

Plaintiffs challenge the Commonwealth's so-called "turn-over" provision, which requires campaign committees to transfer any unexpended funds to the Commonwealth's Registry of Election Finance. The challenged provision reads, in relevant part:

> A slate of candidates shall establish a separate candidate campaign account for each primary, runoff primary, and regular election in which it participates. The unexpended balance of contributions and fund transfers in a candidate campaign account of a slate of candidates which remains after all financial obligations of the particular election for which the account is established have been satisfied shall be forwarded to the registry for deposit in the fund when the account is closed.

KRS § 121A.080(6).

As both plaintiffs and defendants note, this provision is subject to two interpretations. One reading of the statute would find subsection six (6) applicable to *all* candidate slates, with no distinction made between slates receiving public funds (participating slates) and those not receiving such monies (non-participating slates). A second reading would find the subsection to apply to participating slates only.

Plaintiffs argue that the plain meaning of the provision precludes a judicial construction that the statute is applicable to participating slates only. Accordingly, argue plaintiffs, in requiring candidate slates not receiving (or, in the cases of plaintiffs, ineligible for) public financing to "turn-over" unexpended funds to the Registry of Campaign Finance, the statute denies due process of law under the Fourteenth Amendment and constitutes an unconstitutional Fifth Amendment "taking." For their part, defendants acknowledge that, if read as applicable to both participating and non-participating candidates, KRS § 121A.080(6) "would create a host of constitutional problems." [Memorandum of Law in Support of Registry Defendants' Motion for Summary Judgment, Record No. 70, at 11].

Defendants, however, argue that the provision need not be construed so broadly. Defendants note the well-known canon of construction dictating that, when faced with two permissible statutory interpretations, a court should choose the interpretation that will save the statute. *Rust v. Sullivan*, 500 U.S. 173, 190-91, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). Defendants ask the Court to employ this principle in the instant case to find the "turn-over" provision of KRS § 121A.080(6) applicable to participating candidate slates (those slates receiving public monies) only.

The Court finds defendants' argument persuasive and its proposed construction eminently reasonable, and holds that KRS § 121A.080(6) applies to participating candidate slates only. The turn-over provision does not apply to non-participating candidate slates (such as plaintiff). In upholding KRS § 120A.080(6), the Court notes that its conclusion is nothing more than a reiteration of this Court's holding in *Gable v. Jones*, No. 95-12 (E.D. Ky. January 5,

1996)(unpublished), a case which presented the very same issue as decided herein.

2. Count IV - Plaintiff's Challenge to KRS § 121.150(16) (prohibiting the solicitation of contributions for election expenses after regular elections)

In support of its ban on post-election contributions the Commonwealth asserts as its interest that of combating the appearance of quid pro quo corruption - an interest the *Buckley* Court explicitly recognized as compelling. The only question, then, is whether KRS § 121.150(16) may be deemed narrowly tailored.

As an initial matter, the Court notes that - though Kentucky's notorious history of pervasive corruption does not legitimize unbridled regulatory power - the depth and breath of the Commonwealth's history of electoral corruption should not be ignored altogether. Indeed, it might be said that, to a degree, the proper scope of the remedy can only be determined by considering the seriousness of the disease. In the end, however, this Court can do no better than to note the language of the Supreme Court of Alaska in *State of Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597 (1999), *cert. denied*, 528 U.S. 1153, 120 S. Ct. 1156, 145 L. Ed. 2d 1069 (2000), a decision wherein the Alaska Supreme Court was presented with a similar post-election contribution ban. Said the court: "Post-election time limits ... far more clearly address corruption and its appearance because the election has resolved the critical contingency of which candidate will hold office. *We think this latter impact on associational rights is narrowly tailored to further compelling state interests." Id.* at 630 (emphasis added).

It cannot be denied that post-election contributions present unique possibilities of corruption,[8] and are thus deserving of special precautions. The Commonwealth's ban on post-election contributions is just such a precaution, and therefore the Court finds the restriction to be sufficiently narrowly tailored as to survive strict scrutiny.

3. Count V - Plaintiffs' Challenge to KRS § 121A.050(2) (prohibiting cash contributions)

Plaintiffs' mount a facial and as-applied challenge to the Commonwealth's prohibition against cash contributions in gubernatorial elections. The statute amounts to a first-dollar reporting requirement. Plaintiffs allege that KRS

---

[8] Perhaps the foremost of these possibilities is the opportunity to disguise contributors' identities. As noted by a Florida court:

> [A special compelling interest] is the goal of allowing the public to be informed *before* an election of the identities of persons contributing to the campaign of a particular candidate. . . . If post-election contributions were allowed, a candidate could make large expenditures, secure in the knowledge that immediately after the election members of some currently unpopular group whose support for the candidate had not theretofore been disclosed would send in contributions to pay off the deficit. The result, of course, would be that voters may have been deceived into voting for a candidate with allegiances, or at least bedfellows, with which they violently disagree.

Ferre v. State of Florida, 478 So. 2d 1077 (Fla. Dist. Ct. App. 1985), *aff'd and adopted*, 494 So. 2d 214 (1986), *cert denied*, 481 U.S. 1037, 1080 (1987).

§ 121A.050(2) is a content-based restriction, and - as such - is subject to strict scrutiny.

As an initial matter, the Court does not agree with plaintiffs' designation of the appropriate standard of review. Quite simply, the Commonwealth's "no cash" prohibition has no bearing on *what* may be spoken; rather, the restriction is aimed at the *manner* of speech. In other words, the restriction appears not content-based, but rather content-*neutral*. It would follow, then, that the appropriate review standard would be significantly more lax.

Yet it matters not. Even applying the stricter standard, the "no cash" prohibition is narrowly tailored and the Commonwealth's interest is unquestionably compelling.[9] In Kentucky, a state in which cash has proven the preferred currency of electoral corruption,[10] it would seem that

---

[9] The Commonwealth cites three purported interests: (1) informing the electorate, (2) deterring corruption, and (3) enhancing detection. These interests are compelling and have been acknowledged as such. As for the question of narrow tailoring, the Commonwealth notes that disclosure requirements have been recognized as "the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley v. Valeo*, 424 U.S. 1, 68, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

[10] Although the record is replete with testimonials respecting Kentucky's infamous history of electoral corruption, a certain article appearing in the Courier-Journal on October 17, 1987 is particularly instructive. The article, entitled "*Illegal cash, and lots of it, fuels illegal political acts*," is highly illustrative of the special role that cash has played in the facilitation of electoral mischief. The article, one in a series composing a comprehensive investigative report, suggests that the use of illicit cash dates back

prohibiting cash contributions is a virtual sine quo non of legitimate elections. Moreover, the provision is narrowly tailored. The statute does, not sweep broadly; to the contrary, KRS § 121A.050(2) does no more than establish a linkage between gubernatorial campaign contributions and their sources.

In substance, then, KRS § 121A.050(2) amounts to a disclosure requirement, the constitutionality of which the United States Supreme Court has long recognized. *See Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). Accordingly, the restriction is constitutional.

4. Count VI - Plaintiffs' Challenge to KRS §§ 121.150(13) & 121.150(20) (prohibiting candidate loans in excess of $50,000)

Plaintiffs' challenge to the Commonwealth's $50,000 limitation on loans from a candidate to their campaign committees is founded on the assertion that there is no constitutionally-relevant difference between candidate expenditures (which cannot be limited) and loans from a candidate to their campaign committees. Plaintiffs argue that candidate expenditures and loans are "birds of the same feather," and that therefore under *Buckley* the Commonwealth cannot place limitations on either.

The Court disagrees. Candidate loans are most certainly *not* like candidate expenditures, and are in fact different in kind. They are animals not merely of a different breed, but of

---

to Kentucky's first governor, Isaac Shelby, who took office in 1791. [Record No. 70, Exhib. 2].

a different species altogether. The difference is this: fundamentally, loans from candidates to their committees - and, more specifically, the mechanics of repayment - present unique opportunities for corruption.

Plaintiffs, failing to grasp the distinction, ask the question:

> But it impossible [sic] to see if an appearance of corruption arises from contributions to repay a loan after an election why it does not also arise from contributors to pay for the campaign before the election. *Why is it worse for candidates to be held hostage by potential contributors so that their loans might be repaid than it is for candidates to be held hostage by potential contributors who might help candidates win their campaigns in the first place? Candidates are at least equally indebted to contributors to candidates' campaigns who contribute before-the-fact as they are to contributor [sic] who contribute after-the-fact.*

[Record No. 78, Plaintiffs' Memorandum in Opposition to Registry Defendants' Motion for Summary Judgment, p. 2-3] (emphasis added).

By way of response, the Court respectfully suggests that plaintiffs are either unaware of the Commonwealth's electoral history or simply naive as to the historical reality of campaign financing in Kentucky. The problem with candidate loans - and the reason candidate loans are different from candidate expenditures - is that loans require third party repayment, often after an election winner has been determined. The opportunity to contribute to an announced winner opens the door for contributors to contribute not for the constitutionally-protected right of "speaking", but rather for the decidedly-

illegal purpose of quid pro quo corruption. Bluntly, plaintiffs' assumption that election winners are "equally indebted" to pre- and post-election contributors is erroneous. Post-election loan repayment - and loan repayment generally, as compared to candidate expenditures - is "worse" because of the unique possibilities of quid pro quo corruption.

It is this possibility of qui pro quo corruption (or the appearance thereof) that justifies the restriction on loans from candidates to their campaigns. *Buckley* itself made clear that preventing corruption or the appearance of corruption is a compelling state interest sufficient to justify restrictions on First Amendment rights.

As a final note, the Court notes that it finds persuasive Chief Judge Simpson's analysis in *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995), and adopts the reasoning applied therein. In *Wilkinson*, the Western District upheld the very sections challenged here (KRS §§ 121.150(13) & 121.150(20)). In upholding the $ 50,00 loan limit, Chief Judge Simpson identified two distinct compelling interests served by the $50,000 limitation. First, not unlike the prohibition of post-election contributions contained in KRS § 121.150(16), the loan limitation serves to negate the "impression that [a] contributor is lining [a] candidate's pocket, as there is no ongoing campaign to which the contribution may be made." *Id.* at 930. Second,

> the $50,000 loan limit removes the appearance that heavily indebted candidates are easy bedfellows for quid pro quo contributors. Because they may not make loans in excess of $50,000 to their own campaigns, they cease to be personally financially vulnerable and therefore do not appear to be easy targets for corrupt contributors.

Id. at 930-31.

In sum, the Commonwealth's $50,000 limitation on loans by candidates to their campaign committees serves compelling state interests. As well, the provision is narrowly tailored and acts in tandem with other provisions of the statutory scheme in guarding against corruption and the appearance thereof.

5. Count VII - Plaintiffs' Challenge to KRS §§ 121.150(23) and 121A.130(5) (prohibiting contributions during the final twenty-eight (28) days before a general election)

Plaintiffs' challenge KRS § 121.150(23) and 121A.030(5), which prohibit campaign contributions during the twenty-eight (28) days preceding a primary or general election. Although during this period candidates cannot receive contributions, they are permitted to spend any monies previously collected. The provision, then, is not a constitutionally-impermissible restriction on expenditures, but rather an allowable restriction on contributions.[11]

Plaintiffs' challenge to the 28-day window is virtually identical to a previous, unsuccessful challenge to the very same provision. In *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998), the United States Court of Appeals for the Sixth Circuit addressed the very question presented here: whether the 28-day window could be applied constitutionally to candidates not participating in Kentucky's public-financing

---

[11] More specifically, the provision is a restriction on *third-party* contributions. Plaintiffs themselves are permitted to contribute to their own campaigns even during the final twenty-eight (28) days. *See Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998), discussed *infra*.

scheme.[12] The Sixth Circuit held that the 28-day window *could* be so applied.

Because the instant case presents the very same question decided in *Gable*, the Court is tempted simply to cite that case and move on. Plaintiffs, however, attempt to distinguish the *Gable* opinion by noting that, whereas in *Gable* the candidate *declined* participation in the public-financing scheme, in the instant case plaintiff (as a write-in candidate) was *not eligible* to participate. Although plaintiffs' point must be conceded, such is a classic case of a "distinction without a difference" - plaintiff, as a non-participating candidate, must himself concede that his case falls squarely within the ambit of Gable's holding.

In *Gable*, the Sixth Circuit founded its conclusion on its recognition that the 28-day window was an indispensable and central provision of the public-financing scheme. The court correctly reasoned that, absent the window, the Commonwealth would not have sufficient time to calculate candidates' final contribution tallies for purposes of determining whether any non-participating candidates had exceeded the $1.8 million contribution ceiling. The Court noted that it is critical that such calculation be made before the date of election, so as to enable the Registry of Finance to determine whether participating candidates are themselves relieved of the $1.8 million contribution cap. The Court further recognized that this calculation must be made at a point in time before the election sufficient to provide

---

[12] There was, and remains, no dispute that the Commonwealth may impose the 28-day restriction on candidates voluntarily participating in the state's public financing scheme. *Buckley*, 424 U.S. at 57 n.65.

participating parties a reasonable time to solicit additional contributions.[13] This is, after all, the very essence of the statutory scheme.

While noting the indispensability of the 28-day window, the Court did not fail to consider the opposite side of the constitutional equation. Specifically, the court recognized that the effect of the provision is to "rearrange [candidate] fundraising by concentrating it in the period before the 28-day window begins." *Id.* at 951. The Court acknowledged this effect as "not a trivial restriction" but went on to conclude that the court "read *Buckley* to say that such a restriction is justified by Kentucky's interest in combating corruption." *Id.* at 951.

The Court fails to see how *Gable* applies with less force in the instant action. It is true that, unlike in *Gable* (where plaintiff/candidate *chose* not to participate), plaintiff Anderson in the instant action was *ineligible* from the outset. But this distinction does not push the instant action outside the reach of *Gable's* holding, and the constitutional analysis presented therein is no less applicable here. Plaintiffs contend that "the Kentucky financing scheme is not a house of cards that will fall if those banished from the house must no longer suffer the burden of sustaining it." [Record No. 78, Plaintiffs' Memorandum in Opposition to Registry Defendants' Motion for Summary Judgment, at 8]. Plaintiffs argue further that "if

---

[13] The "trigger" provision is KRS § 121A.030(5)(a). The provision amounts to "a mechanism whereby, when a non-participating [candidate] collects more than $1.8 million in campaign funds in a primary or general election, the $1.8 million ceiling is lifted for participating [candidates], and the 28-day window is lifted for all [candidates]." *Gable v. Patton*, 142 F.3d 940, 947 (6th Cir. 1998).

write-in candidates who are categorically ineligible for the campaign finance scheme are no longer required to abide by the 28-day window, the scheme will continue to work for all those eligible to participate in it." *Id.* For all the reasons detailed above, this is simply not true. As recognized by the *Gable* court and as outlined above, the 28-day window is a pillar without which the Commonwealth's public-financing scheme cannot stand. The provision is valid under both *Buckley* and *Gable*.

6. Count VIII - Plaintiffs' Allegation that KRS Chapter 121A Violates the Equal Protection Clause of the Fourteenth Amendment

Plaintiffs mount a general challenge to chapter 121A, Kentucky's Public Financing Campaign Act. The thrust of plaintiffs objection is that, because Kentucky write-in candidates such as plaintiff are - as a class - categorically ineligible for public financing, write-in candidates such as plaintiff are denied equal protection of the law. Plaintiffs claim that the Commonwealth's apportionment of public financing in this way invidiously discriminates against write-in candidates.

As an initial matter, the Court notes that equal protection challenges to public-financing schemes are not novel. In fact, the equal protection issue was first addressed in *Buckley* itself. There, the Supreme Court established (among other things) the basic principle that "the Constitution does not require Congress to treat all declared candidates the same for public financing purposes." *Buckley v. Valeo*, 424 U.S. at 94-95 (1976). In this foray into the murky world of public-financing systems, this basic precept provides a clearly-demarcated and invaluable point-of-reference. Ultimately, is it this basic principle that guides the holding of this Court.

Buckley's plain language requires that this Court dismiss plaintiffs challenge. There, the Supreme Court unequivocally stated that "*the limited participation or nonparticipation of nonmajor parties or candidates in public funding does not unconstitutionally disadvantage them.*" *Buckley v. Valeo*, 424 U.S. 1, 101, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (emphasis added). In arriving at its conclusion, that Court noted that public-financing is "only one method of obtaining pre-election financing... Plainly, campaigns can be successfully carried out by means other than public financing; they have been [up to that time]." *Id.* at 101-02.[14]

In upholding the Commonwealth's categorical exclusion of write-in candidates from public-funding eligibility, this Court is not unmindful that the instant action presents a significant twist on the *Buckley* equal protection analysis, a distinction that may, indeed, be said to inch the Commonwealth's scheme in the direction of invidious discrimination. Specifically, it must be noted that the *Buckley* Court justified the constitutionality of public-funding in part by emphasizing that, in conditioning public funding on acceptance of expenditure limits, the scheme at issue there imposed countervailing "burdens" on publicly-financed candidates. *Buckley*, 424 U.S. at 95 n.129. The Supreme Court noted that, in this respect, public-financing schemes

---

[14] A later court summarized *Buckley's* holding on this point in more dramatic fashion. Wrote the United States District Court for the District of Rhode Island: "The *Buckley* Court rejected an equal protection challenge to the presidential campaign funding scheme brought by minor party candidates who not only were disadvantaged as compared to publicly funded major party opponents, but who were denied participation in the scheme altogether." *Vote Choice, Inc. v. Di Stefano*, 814 F. Supp. 195, 206 (D.R.I. 1993).

may actually *improve* the chances of candidates not receiving public funding. *Id.* By stark contrast, however, the Commonwealth's scheme - by virtue of its "trigger provision" - in effect contains no such limitations. Under Kentucky's scheme, though it is true that participating candidates are initially barred from receiving contributions or making expenditures in excess of $1.8 million, *this limitation is lifted* if any non-participating candidate receives or expends more than the $1.8 million cap. KRS § 121A.030(5). Unlike as in the *Buckley* context, then, the Commonwealth's scheme does not provide this countervailing "burden".

This is not an insignificant distinction. In the final analysis, however, the Court finds that this is not enough to pull the Commonwealth's scheme out from the constitutional umbrella of *Buckley*. Plaintiffs' equal protection challenge fails.

7. Count IX - Plaintiffs' Allegation that Kentucky's Financing Scheme Effectively Limits Plaintiffs' Expenditures to the Limits Imposed on Participating Candidates

Plaintiffs challenge Kentucky's "trigger" provision, KRS § 121A.080(4)-(5), the centerpiece of Kentucky's public-financing scheme, on the ground that the Commonwealth's $1.8 million contribution/expenditure cap does not merely provide incentive for participation in the public-financing scheme but in facts amounts to unconstitutional coercion. Though the Sixth Circuit in *Gable v. Patton*, 142 F.3d 940, 947-49 (6th Cir. 1998), squarely dismissed this argument in the context of a facial challenge to the provision, plaintiffs in the instant action attempt to circumvent the Sixth Circuit's holding by challenging the statute as-applied.

Here too, however, plaintiffs distinguish *Gable* by noting that, whereas there the candidate *elected* to forego public funding, here candidate Anderson (as a write-in candidate) *was categorically ineligible*. Again, the Court concedes the distinction.

Yet it matters not. As recognized by the *Gable* court, Kentucky's trigger provision is an acceptable incentive to participate in the Commonwealth's public-financing scheme, and to adhere to corruption-preventing contribution and expenditure limitations imposed thereby. The Court does not perceive the fact of plaintiff Anderson's ineligibility to change the constitutional landscape whatsoever: whether non-participating by choice or on account of ineligibility, non-participating candidates are in both instances presented with a "strategic choice"[15] to accept or reject the scheme's $1.8

---

[15] The term is Chief Judge Simpson's. Wrote the Chief Judge, regarding the tactical choice facing non-participating candidates:

> Under the Kentucky statute the determination whether to exceed $1.8 million and thus trigger the release of the opposition is a calculated *strategic decision* to be made by the privately-financed candidate. This decision must be made in the context of his campaign plan and only after $1.8 million in speech on the issue has already taken place. As the privately-financed candidate nears the $1.8 million mark, there would have already been a significant amount of unconstrained speech on the issues. As noted in *Republican National Committee*, "Not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." This court is not convinced that 121A.030(5)(a) [the "trigger" provision] impermissibly chills the speech of privately-financed candidates simply because it enables the speakers' adversaries to respond. It occurs to this court that the

million expenditure/contribution limitation. The constitutionality of this "strategic decision" was upheld in *Gable* and is unaffected by the fact of plaintiffs' ineligibility for public funding. As such, Kentucky's trigger provision is constitutional not only on its face but as applied to plaintiffs as well.

8. Count X - Plaintiffs' Allegation that the Commonwealth's Public Financing Scheme In Effect Unconstitutionally Limits Plaintiff Anderson's Expenditures

Plaintiffs' final count addresses the scheme's definition of "contribution," found in KRS § 121A.010(11). Specifically, plaintiffs allege that the scheme's inclusion of candidates' personal expenditures as "contributions" (for purposes of activating the trigger provision) amounts to a constitutionally-significant "disadvantage" to non-participating candidates such as plaintiff Anderson. In support of their contention - a contention that in substance does not materially differ from plaintiffs' general objection to the scheme's trigger provision - plaintiffs argue that the scheme's inclusion of candidate expenditures in the definition of "contribution" serves only to exacerbate the problems presented by the existence of the trigger.

Plaintiffs' argument is wholly without merit. Fundamentally, it does not follow that simply because the Commonwealth has elected to treat contributions by candidates to their own campaigns as "contributions" for

---

trigger provision promotes more speech, not less.

Wilkinson v. Jones, 876 F. Supp. 916, 926-27 (1995).

purposes of counting toward activation of the trigger that therefore candidates are in any way limited in terms of the amount they may contribute. Defining "contribution" to include candidate contributions to their own campaigns simply does nothing to alter the basic rule of *Buckley* that a candidate may not be limited in the amount of money he may himself expend to advance his campaign. In the instant case, for example, counting plaintiff Anderson's contributions to his own campaign as "contributions" for purposes of the scheme's trigger does not amount to a cap or ceiling on plaintiff Anderson's allowable expenditures; were he to have the inclination and resource, plaintiff Anderson is free to expend billions.

In substance, defining "contribution" as such does no more than offer participating candidates an opportunity to exceed the statutorily-imposed contribution/expenditure limitation should non-participating candidates do so themselves. It provides a fair method of calculation. Perceived from this angle, the scheme's inclusion of candidate expenditures in the definition of "contributions" is no more than an essential incentive provision without which candidates would be far more wary of participating in the Commonwealth's public-financing scheme. Were candidate contributions not counted toward activation of the trigger, non-participating candidates could safely contribute unlimited sums of their own funds without relieving participating candidates of the imposition of the $1.8 million limit. Such a scenario would render participation in the Commonwealth's public-financing scheme very risk business. Viewed this way, it is quite clear that the scheme's inclusion of candidate contributions in the definition of "contribution" is tantamount to an essential and constitutionally valid incentive provision.

III. Conclusion

This action amounts to an omnibus challenge to central provisions of Kentucky's election laws and public-financing scheme. For the reasons outlined above, the Court does not perceive any constitutional infractions. The Court rejects plaintiffs' challenge in all respects.

Accordingly,

IT IS HEREBY ORDERED

(1) That plaintiffs' motion for summary judgment [Record No. 69] be, and the same hereby is, **DENIED;** and

(2) That defendants' motion for summary judgment [Record Nos. 70 & 71] be, and the same hereby are, **GRANTED.**

This the 21st day of March, 2002.

JOSEPH M. HOOD, JUDGE

JUDGMENT

In accordance with the Memorandum Opinion and Order of even date and entered contemporaneously herewith,

IT IS HEREBY ORDERED:

(1) That this action be, and the same hereby is, **DISMISSED AND STRICKEN FROM THE ACTIVE DOCKET;**

(2) That all pending motions be, and the same hereby are, **DENIED AS MOOT;**

(3) That all scheduled proceedings be, and the same hereby are, **CONTINUED GENERALLY.**

This the 21st day of March, 2002.

JOSEPH M. HOOD, JUDGE

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, or to petition the Government for a redress of grievances [U.S. Const. Amend. I.].

The Fourteenth Amendment to the U.S. Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [U.S. Const. Amend. XIV, § 1.].

Ky. Rev. Stat. ("KRS") § 117.235(3) provides:

> No person shall, on the day of any election as established in KRS 118.025, do any electioneering at the polling place or within a distance of five hundred (500) feet of a county clerk's office or any entrance to a building in which a voting machine is located if that

> entrance is unlocked and is used by voters on election day, unless the fiscal court or legislative body of an urban-county government, on a countywide basis, specifically prohibits electioneering on the day of any election by ordinance for a distance greater than five hundred (500) feet from the polling place. Electioneering shall include the displaying of signs, the distribution of campaign literature, cards, or handbills, the soliciting of signatures to any petition, or the solicitation of votes for or against any candidate or question on the ballot in any manner, but shall not include exit polling. Nothing contained in this section shall prohibit electioneering conducted within a private residence or establishment other than that in which the polling place is located by persons having an ownership interest in such property.

Ky. Rev. Stat. ("KRS") § 121A.010(11)(a) defines "contribution" as including:

> [A]ny: 1. Payment, distribution, loan, deposit, or gift of money or other thing of value, to a slate of candidates, its agent, a committee, or a contributing organization. As used in this subsection, "loan" shall include a guarantee, endorsement, or other form of security where the risk of nonpayment rests with the surety, guarantor, or endorser, as well as with a committee, contributing organization, slate of candidates, or other primary obligor. No individual shall become liable as surety, endorser, or guarantor for any sum which when combined with all other contributions the individual makes to the slate of candidates, its agent, the committee, or the contributing organization, exceeds the contribution limits provided in KRS 121.150

Ky. Rev. Stat. ("KRS") § 121A.030 provides:

> (1) A qualifying slate of candidates for Governor and Lieutenant Governor that receives transfers from the fund may make campaign expenditures which, in the aggregate, including the expenditure of transfers from the fund, shall not exceed one million eight hundred thousand dollars ($1,800,000) in connection with a primary election campaign and one million eight hundred thousand dollars ($1,800,000) in connection with a regular election campaign, subject to the provisions of KRS 121A.080(4) and (5), and three hundred thousand dollars ($300,000) in connection with a runoff primary campaign.
>
> (2) The expenditure limit amounts established in subsection (1) of this section shall be increased or decreased in accordance with the consumer price index for all urban workers, and the registry shall make that adjustment in a year in which a Governor and Lieutenant Governor are elected not later than the filing deadline for the primary election.
>
> (3) No qualifying slate of candidates for Governor and Lieutenant Governor that receives a transfer from the fund or that is otherwise subject to expenditure limitations shall exceed the expenditure limitations of subsection (1) of this section through an additional reported or unreported expenditure by any person, committee, or contributing organization which does not qualify as an independent expenditure.
>
> (4) A slate of candidates for Governor and Lieutenant Governor that has filed a statement of intent to accept transfers from the fund and abide by the maximum

expenditure limit that was not rescinded pursuant to KRS 121A.040(4) may receive contributions from permanent committees which, in the aggregate, shall not exceed twenty-five percent (25%) of the qualifying contributions received by the slate of candidates in any one (1) election. A slate of candidates that has filed a statement of intent to reject transfers from the fund and not abide by the maximum expenditure limit or one that has rescinded a statement of intent to accept transfers from the fund pursuant to KRS 121A.040(4) may receive contributions from permanent committees which, in the aggregate, shall not exceed twenty-five percent (25%) of the qualifying contributions received by the slate of candidates in any one (1) election up to a maximum of one hundred fifty thousand dollars ($150,000) in any one (1) election.

(5) No slate of candidates for Governor and Lieutenant Governor shall knowingly accept any other campaign contribution during the twenty-eight (28) days immediately preceding a primary or regular election and during the fourteen (14) days immediately preceding a runoff primary except:

(a) A qualifying slate of candidates that has elected to become eligible for fund transfers or who may in the future elect to become eligible for fund transfers shall be released from expenditure limitations following a certification by the registry pursuant to KRS 121A.080(4) or (5) that a slate of candidates that has not elected to become eligible for fund transfers has received contributions or made expenditures in excess of the expenditure limits provided in subsection (1) of this section; or

(b) The matching ratio of fund transfers established in KRS 121A.060(3)(c) has been reduced by the registry pursuant to KRS 121A.080(3). If the registry reduces the matching ratio of fund transfers, a qualifying slate of candidates that has elected to become eligible for fund transfers or that may in the future elect to become eligible for fund transfers, may accept aggregate qualifying contributions which, when added to the maximum threshold qualifying amount established in KRS 121A.060(1) and the amount equal to the reduced matching ratio of fund transfers shall not exceed the expenditure limit established in subsection (1) of this section, unless a qualifying slate of candidates has been released from expenditure limitations pursuant to KRS 121A.080(4) or (5).

Ky. Rev. Stat. ("KRS") § 121A.050(2) provides:

No slate of candidates shall knowingly accept any cash contribution from a natural person, permanent committee, state or county executive committee of a political party, or contributing organization. No natural person, permanent committee, state or county executive committee of a political party, or contributing organization shall knowingly make a cash contribution to a slate of candidates.

Ky. Rev. Stat. ("KRS") § 121A.070 provides:

(1) All transfers received from the fund by a qualifying slate of candidates and all contributions or personal resources of any slate of candidates to be used for campaign expenditures shall be deposited in the candidate campaign account.

(2) For each deposit of a contribution of any amount from a permanent committee to a slate of candidates for Governor and Lieutenant Governor made in the slate's campaign account, there shall be retained by the campaign treasurer a short statement, in the form prescribed by the registry, showing:

(a) The amount of each permanent committee's contribution deposited;

(b) The date each permanent committee's contribution was received; and

(c) The name and business address of the permanent committee and a description of the major business, social, or political interest represented by the permanent committee.

(3) For each deposit of funds received, other than contributions by permanent committees, in excess of one hundred dollars ($100) made in the account of any slate of candidates for Governor and Lieutenant Governor, there shall be retained by the campaign treasurer a short statement, in the form prescribed by the registry, showing:

(a) The amount of each contribution or amount of personal resources deposited;

(b) The date each contribution was received or each amount of personal resources was made available; and

(c) The name, address, and, in the case of individuals, occupation and employer of each contributor and the spouse of the contributor, and, if a contribution is

made from the personal resources of the slate of candidates, the banks and account numbers from which the funds were transferred. The occupation listed for each contributor shall be specific. A general classification, such as "businessman," shall be insufficient. If the contributor or the spouse of the contributor is self-employed, the name under which he is doing business shall be listed.

(4) The slate of candidates shall designate in writing, to be filed with the registry, not more than three (3) individuals who shall be authorized, in addition to the slate, to withdraw funds from the candidate campaign account.

(5) No individual authorized to make withdrawals from the candidate campaign account shall pay any amount out of the account for goods or services furnished, other than staff salaries, except upon the presentation of an invoice submitted by the person to whom the payment is to be made. The invoice shall describe disbursements to persons, the name, address, occupation, and employer of each person, and the date and the amount disbursed. These invoices shall be preserved by the slate of candidates and made available for reasonable inspection and auditing by employees of the registry.

Ky. Rev. Stat. ("KRS") § 121A.080 provides:

(1) If the registry certifies that a qualifying slate of candidates is eligible to receive a transfer from the fund, the slate may submit a transfer entitlement voucher to the registry, complying with the procedures of subsection (7) of this section.

Qualifying slates of candidates may receive transfers from the fund according to the matching ratio and threshold levels of qualifying contributions received specified in KRS 121A.060(3)(c) and 121A.060(1), respectively. Subject to subsections (4) and (5) of this section, a transfer entitlement voucher may document total qualifying contributions of not less than three hundred thousand dollars ($300,000) but not more than six hundred thousand dollars ($600,000) for a primary or regular election for receipt of total fund transfers equal to twice the amount of qualifying contributions documented. A qualifying slate may submit multiple transfer entitlement vouchers as additional qualifying contributions are received in an election, but the maximum amount of fund transfers a slate may receive in a primary or regular election shall not exceed one million two hundred thousand dollars ($1,200,000), subject to the provisions of subsections (4) and (5) of this section.

(2) The fund transfer which a qualifying slate of candidates for Governor and Lieutenant Governor in a runoff primary may receive shall be three hundred thousand dollars ($300,000).

(3) The fund transfer amounts shall be increased or decreased in accordance with the consumer price index for all urban workers, and the registry shall make that adjustment annually, beginning in 1996, and in a year in which a Governor and Lieutenant Governor are elected not later than the filing deadline for the primary election. If the registry makes a finding of fact, after a public hearing of which all slates of candidates for Governor and Lieutenant Governor shall be notified, that the existing

appropriations in the fund are insufficient to cover the anticipated fund transfers, the registry shall reduce the matching ratio to the ratio the registry determines so as not to exceed the amount of the fund. If the matching ratio is reduced for a primary election, it shall be applied retroactively to all transfers made to qualifying slates of candidates in the primary election. If the matching ratio is reduced for a regular election, it shall be applied retroactively to all transfers made to qualifying slates of candidates in the regular election.

(4) (a) If the registry makes a finding of fact, after a public hearing of which all slates of candidates for Governor and Lieutenant Governor shall be notified, that in the course of a primary election, runoff primary election, or regular election campaign a slate of candidates for Governor and Lieutenant Governor that has not accepted the provisions of this chapter has received contributions or made expenditures in excess of the expenditure limit as provided in KRS 121A.030(1), the registry shall certify that those slates of candidates that have elected to become eligible for fund transfers or may in the future elect to become eligible for fund transfers shall be released from expenditure limitations and may receive and submit for fund transfers qualifying contributions in excess of six hundred thousand dollars ($600,000). Slates of candidates released from expenditure limitations in a primary or regular election shall continue to be eligible to receive transfers from the fund. A slate of candidates that is released from expenditure limitations in a runoff primary shall not be eligible for transfers from the fund in excess of three hundred thousand dollars ($300,000), but shall be eligible to accept qualifying contributions for the runoff primary;

(b) The registry shall conduct a public hearing within three (3) days after any report submitted to the registry by a campaign committee of a slate of candidates indicates that the slate of candidates has, or may have, received contributions or made expenditures in excess of the expenditure limits as provided in KRS 121A.030(1). The registry shall issue a ruling not later than seven (7) days after the public hearing; and

(c) A public hearing shall be conducted within three (3) days upon petition to the registry by a slate of candidates that, based upon its knowledge and belief, another slate of candidates has, or may have, received contributions in excess of the expenditure limitations as provided in KRS 121A.030(1). The registry shall issue a ruling not later than seven (7) days after the public hearing.

(5) Nothing in this section shall prevent any slate of candidates from notifying the registry in writing that its campaign committee has received contributions or made expenditures in excess of the expenditure limitations as provided in KRS 121A.030(1). In that case, no public hearing shall be held and the registry shall certify that those slates of candidates who have elected to become eligible for fund transfers or may in the future elect to become eligible for fund transfers for that election shall be released from expenditure limitations for that election and shall continue to be eligible to receive transfers from the fund if qualified by law.

(6) A slate of candidates shall establish a separate candidate campaign account for each primary, runoff

primary, and regular election in which it participates. The unexpended balance of contributions and fund transfers in a candidate campaign account of a slate of candidates which remains after all financial obligations of the particular election for which the account is established have been satisfied shall be forwarded to the registry for deposit in the fund when the account is closed. The payment to the fund shall be made not later than ten (10) working days after the candidate campaign account for a particular election is closed. Funds in the candidate campaign account of a slate of candidates shall be expended only for expenses incurred in the particular election for which the account is established and shall not be used to pay expenses incurred in any other election or for any other purpose.

(7) To receive fund transfers for which it is eligible, each qualifying slate of candidates shall submit to the registry at the times and in the form and manner the registry may require, a transfer entitlement voucher. The voucher shall include the full name of all persons making a contribution to the campaign committee of the slate of candidates together with the date, the exact amount of the contribution, the specific address of the contributor, the congressional district in which the contributor resides, the occupation and employer of the contributor and the spouse of the contributor, or, if the contributor or the spouse of contributor is self-employed, the name under which he is doing business.

(8) Within three (3) working days of the receipt of the voucher, the registry shall:

(a) Make a determination, according to the procedures the registry may establish by administrative regulation, whether each contribution enumerated on the voucher is consistent with the provisions of this chapter;

(b) Certify for payment to the qualifying slate of candidates the amount of fund transfer for which it is eligible; and

(c) Promptly upon certification, issue a warrant on the fund for a transfer to the qualifying slate of candidates or its authorized treasurer in the amount certified by the registry.

(9) For the purpose of financing primary election campaigns, the registry shall make no transfer to a qualifying slate of candidates entitled to transfers from the fund earlier than January 1 of a year in which the Governor and Lieutenant Governor are elected.

(10) Transfers from the fund for a regular election campaign shall not be made earlier than the date the results of the primary election preceding the regular election of a year in which the Governor and Lieutenant Governor are elected are certified. If a qualifying slate of candidates is unopposed in a primary election, or has no opposition that has received contributions of not less than the threshold qualifying amount for the primary election, the registry shall make no transfer to that slate from the fund for the primary election. If a qualifying slate of candidates is unopposed in a regular election, or has no opposition that has received contributions of not less than the minimum threshold qualifying amount for

the regular election, the registry shall make no transfer to that slate from the fund for the regular election.

(11) If a vacancy occurs in a slate of candidates before the ballots are printed for the primary election because of death, disqualification to hold the office sought, or severe disabling condition which arose after the slate formed a campaign committee, the remaining member of the slate may designate a replacement for the vacant candidate or change the composition of the slate and designate a running mate on forms filed with the registry not later than the deadline for printing primary election ballots, but only following certification to the remaining candidate by the Secretary of State that a vacancy exists for a reason specified in this subsection. If a vacancy occurs in a slate of candidates after the ballots are printed for the primary election, the remaining member of the slate may designate a replacement for the vacant candidate or change the composition of the slate and designate a running mate on forms filed with the registry prior to the primary election, but only following certification to the remaining candidate by the Secretary of State that a vacancy exists for a reason specified in this subsection. If a replacement for a vacant candidate is made after the ballots are printed for the primary election because of death, disqualification to hold the office sought, or severe disabling condition which arose after the slate formed a campaign committee, notices informing the voters of the change in the composition of the slate shall be posted at each precinct polling place.

(12) The provisions of KRS 118.105 shall apply to vacancies occurring in the nomination of a qualifying slate of candidates.

(13) If during the course of a primary or regular election, a qualifying slate of candidates withdraws, is otherwise removed from the ballot, becomes the only slate of candidates for a party nomination or election on the ballot, or if both candidates on the slate die, the registry shall certify and pay on vouchers previously submitted by that slate, but any subsequent vouchers submitted by that slate shall not be certified nor shall transfers be made.

(14) The registry shall not certify any contribution made to a qualifying slate of candidates entitled to transfers from the fund, which, when added to other contributions made by the same contributor to the slate in connection with the primary election and in connection with the regular election, violates the provisions of KRS 121A.050 or 121.150.

(15) The registry shall perform a continuing audit of all slates of candidates for Governor and Lieutenant Governor to ensure that they are in compliance with this chapter and the election laws of the Commonwealth.

Ky. Rev. Stat. ("KRS") § 121.150 provides:

(1) No contribution shall be made or received, directly or indirectly, other than an independent expenditure, to support inauguration activities or to support or defeat a candidate, slate of candidates, constitutional amendment, or public question which will appear on

the ballot in an election, except through the duly appointed campaign manager, or campaign treasurer of the candidate, slate of candidates, or registered committee. Any person making an independent expenditure, shall report these expenditures when the expenditures by that person exceed five hundred dollars ($500) in the aggregate in any one (1) election, on a form provided or using a format approved by the registry and shall sign a statement on the form, under penalty of perjury, that the expenditure was an actual independent expenditure and that there was no prior communication with the campaign on whose behalf it was made.

(2) Except as provided in KRS 121.180(10), the solicitation from and contributions by campaign committees, political issues committees, permanent committees, and party executive committees to any religious, charitable, civic, eleemosynary, or other causes or organizations established primarily for the public good is expressly prohibited; except that it shall not be construed as a violation of this section for a candidate to contribute to religious, civic, or charitable groups.

(3) No candidate, slate of candidates, committee, or contributing organization, nor anyone acting on their behalf, shall accept any anonymous contribution in excess of fifty dollars ($50), and all anonymous contributions in excess of fifty dollars ($50) shall be returned to the donor, if the donor can be determined. If no donor is found, the contribution shall escheat to the state and be transferred to the election campaign fund established by KRS 121A.020. No candidate, slate of candidates, committee, or contributing

organization, nor anyone acting on their behalf shall accept anonymous contributions in excess of one thousand dollars ($1,000) in the aggregate in any one (1) election. Anonymous contributions in excess of one thousand dollars ($1,000) in the aggregate which are received in any one (1) election shall escheat to the state and be transferred to the election campaign fund established by KRS 121A.020.

(4) No candidate, committee, or contributing organization, nor anyone on their behalf, shall accept a cash contribution in excess of fifty dollars ($50) in the aggregate from each contributor in any one (1) election. No candidate, committee, or contributing organization, nor anyone on their behalf, shall accept a cashier's check or money order in excess of the maximum cash contribution limit unless the instrument clearly identifies both the payor and the payee. A contribution made by cashier's check or money order which identifies both the payor and payee shall be treated as a contribution made by check for purposes of the contribution limits contained in this section. No person shall make a cash contribution in excess of fifty dollars ($50) in the aggregate in any one (1) election to a candidate, committee, or contributing organization, nor anyone on their behalf.

(5) No candidate, slate of candidates, committee, contributing organization, nor anyone on their behalf, shall accept any contribution in excess of one hundred dollars ($100) from any person who shall not become eighteen (18) years of age on or before the day of the next general election.

(6) No candidate, campaign committee, political issues committee, nor anyone acting on their behalf, shall accept a contribution of more than one thousand dollars ($1,000) from any person, permanent committee, or contributing organization in any one (1) election; except that no candidate for school board, his campaign committee, nor anyone acting on their behalf shall accept a contribution of more than one hundred dollars ($100) from any person or more than two hundred dollars ($200) from any permanent committee or contributing organization in any one (1) election. No person, permanent committee, or contributing organization shall contribute more than one thousand dollars ($1,000) to any one (1) candidate, campaign committee, political issues committee, nor anyone acting on their behalf, in any one (1) election; except that no person shall contribute more than one hundred dollars ($100) and no permanent committee or contributing organization shall contribute more than two hundred dollars ($200) to any one (1) school board candidate, his campaign committee, nor anyone acting on their behalf, in any one (1) election. Limits on contributions for slates of candidates for Governor and Lieutenant Governor which may be made or received in any one (1) election shall be governed by the provisions of KRS 121A.050.

(7) Permanent committees or contributing organizations affiliated by bylaw structure or by registration, as determined by the Registry of Election Finance, shall be considered as one (1) committee for purposes of applying the contribution limits of subsection (6) of this section.

(8) No permanent committee shall contribute funds to another permanent committee for the purpose of circumventing contribution limits of subsection (6) of this section.

(9) No person shall contribute funds to a permanent committee, political issues committee, or contributing organization for the purpose of circumventing the contribution limits of subsection (6) of this section.

(10) No person shall contribute more than one thousand five hundred dollars ($1,500) to all permanent committees and contributing organizations in any one (1) year.

(11) No person shall contribute more than two thousand five hundred dollars ($2,500) to the state executive committee of a political party and its subdivisions and affiliates in any one (1) year. Contributions a person makes to a political party in excess of one thousand dollars ($1,000) in any one (1) year shall be deposited in a separate account which the state executive committee maintains for the exclusive purpose of paying administrative costs incurred by the political party.

(12) No person shall make a payment, distribution, loan, advance, deposit, or gift of money to another person to contribute to a candidate, committee, contributing organization, or anyone on their behalf. No candidate, committee, contributing organization, nor anyone on their behalf shall accept a contribution made by one (1) person who has received a payment, distribution, loan, advance, deposit, or gift of money from another person to contribute to a candidate,

committee, contributing organization, or anyone on their behalf.

(13) No candidates running as a slate for the offices of Governor and Lieutenant Governor shall make combined total personal loans to their committee in excess of fifty thousand dollars ($50,000) in any one (1) election. No candidate for any other statewide elected state office shall lend to his committee any amount in excess of twenty-five thousand dollars ($25,000) in any one (1) election. In campaigning for all other offices, no candidate shall lend to his committee more than ten thousand dollars ($10,000) in any one (1) election.

(14) Subject to the provisions of subsection (20) of this section, no candidate or slate of candidates for nomination to any state, county, city, or district office, nor their campaign committees, nor anyone on their behalf, shall solicit or accept contributions for primary election expenses after the date of the primary. No person other than the candidate or slate of candidates shall contribute for primary election expenses after the date of the primary.

(15) Subject to the provisions of subsection (20) of this section, no slate of candidates for nomination for election to the offices of Governor and Lieutenant Governor, nor its campaign committees, nor anyone on their behalf, shall solicit or accept contributions for runoff primary election expenses after the date of the runoff primary. No person other than the slated candidates shall contribute for runoff primary election expenses after the date of the runoff primary.

(16) Subject to the provisions of subsection (20) of this section, no candidate or slate of candidates for any state, county, city, or district office at a regular election, nor their campaign committees, nor anyone on their behalf, shall solicit or accept contributions for regular election expenses after the date of the regular election. No person other than the candidate or slate of candidates shall contribute for regular election expenses after the date of the regular election.

(17) Subject to the provisions of subsection (20) of this section, no candidate or slate of candidates for nomination or election to any state, county, city, or district office, nor their campaign committees, nor anyone on their behalf, shall solicit or accept contributions for special election expenses after the date of the special election. No person other than the candidate or slate of candidates shall contribute for special election expenses after the date of the special election.

(18) Nothing in subsections (14) to (17) of this section shall be deemed to prohibit a slate of candidates from receiving transfers from the election campaign fund established by KRS 121A.020 for which it is eligible for matches of qualifying contributions received prior to the date of the election but for which no transfer from the fund had been made prior to the date of the election.

(19) The provisions of subsections (14) and (16) of this section shall apply only to those candidates in a primary or regular election which shall be conducted subsequent to January 1, 1989. The provisions of subsections (15) and (17) of this section shall apply

only to those candidates or slates of candidates in a runoff primary or special election which shall be conducted subsequent to January 1, 1993.

(20) A candidate, slate of candidates, or a campaign committee may solicit and accept contributions after the date of a primary election, runoff primary election, regular election, or special election to defray necessary expenses that arise after the date of the election associated with election contests, recounts, and recanvasses of a specific election, complaints regarding alleged campaign finance violations that are filed with the registry pertaining to a specific election, or other legal actions pertaining to a specific election to which a candidate, slate of candidates, or campaign committee is a party. Reports of contributions received and expenditures made after the date of the specific election shall be made in accordance with KRS 121.180.

(21) No slate of candidates for Governor and Lieutenant Governor or their immediate families shall loan any money, service, or other thing of value to their campaign, and all moneys, services, or other things of value which are loaned shall be deemed a contribution, which may not be recovered by the slate of candidates, except to the extent of a combined total of fifty thousand dollars ($50,000).

(22) No candidate, slate of candidates, committee, except a political issues committee, or contributing organization, nor anyone on their behalf, shall knowingly accept a contribution from a corporation, directly or indirectly.

(23) Nothing in this section shall be construed to restrict the ability of a corporation to administer its permanent committee insofar as its actions can be deemed not to influence an election as prohibited by KRS 121.025.

(24) In addition to the prohibitions set forth in this section, no slate of candidates shall accept any contribution during the twenty-eight (28) days immediately preceding a primary or regular election except as provided in KRS 121A.030(5).

(25) No candidate, slate of candidates, or committee, nor anyone on their behalf, shall solicit a contribution of money or services from a state employee, whether or not the employee is covered by the classified service provisions of KRS Chapter 18A. However, it shall not be a violation of this subsection for a state employee to receive a solicitation directed to him as a registered voter in an identified precinct as part of an overall plan to contact voters not identified as state employees.

(26) (a) A candidate for elective public office, except slates of candidates for Governor and Lieutenant Governor, shall not accept contributions from permanent committees which, in the aggregate, exceed fifty percent (50%) of the total contributions accepted by the candidate in any one (1) election or ten thousand dollars ($10,000) in any one (1) election, whichever is the greater amount. The percentage of the total contributions or dollar amounts of contributions accepted by a candidate in an election that is accepted from permanent committees shall be calculated as of the day of each election. Funds in a

candidate's campaign account which are carried forward from one (1) election to another shall not be considered in calculating the acceptable percentage or dollar amount of contributions which may be accepted from permanent committees for the election for which the funds are carried forward. A candidate may, without penalty, contribute funds to his campaign account not later than sixty (60) days following the election so as not to exceed the permitted percentage or dollar amount of contributions which may be accepted from permanent committees or the candidate may, not later than sixty (60) days after the end of the election, refund any excess permanent committee contributions on a pro rata basis to the permanent committees whose contributions are accepted after the aggregate limit has been reached.

(b) The provisions of paragraph (a) of this subsection regarding the receipt of aggregate contributions from permanent committees in any one (1) election shall also apply separately to the receipt of aggregate contributions from executive committees of any county, district, state, or federal political party in any one (1) election.

(27) No candidate or slate of candidates for any office in this state shall accept a contribution, including an in-kind contribution, which is made from funds in a federal campaign account. No person shall make a contribution, including an in-kind contribution, from funds in a federal campaign account to any candidate or slate of candidates for any office in this state.

APPENDIX E

SELECTED EXCERPTS FROM LEGISLATIVE HISTORY MADE A PART OF COURT OF APPEALS RECORD

The following text are direct quotations from a series of Louisville *Courier-Journal* articles that were published in October of 1987, following a year long investigation by the newspaper. The entire series of newspaper articles was included in the Attorney General's Task Force report, which led the Kentucky General Assembly to amend its election laws and election finance laws. The full Task Force Report is part of the district court and appellate court record. The following excerpts give some of the highlights. The district court cited these articles in his opinion.

From the October 11, 1987 Courier-Journal, banner page headlined: "WINNING AT ANY COST HOW MONEY POISONS KENTUCKY'S ELECTIONS, Public Trust is Damaged by a Host of Abuses"

"During its investigation, the newspaper found that:

> ■The skyrocketting cost of political campaigns – the price tag on this year's governor's race is likely to be $15 million, compared to $2 million in 1967 – is increasing pressure on candidates to compromise themselves while raising money. . .

There are no limits on what a candidate can raise and spend, and state jobs, board seats and contracts have been

given to favored friends and loyal patrons in exchange for generous donations.

For example, shortly after Gov. Martha Layne Collins took office in December 1983, then-Transportation Secretary Floyd Poore, one of the top fund-raisers in her campaign, submitted a lengthy list of supporters who were in line to get state positions. . .

A survey by the newspaper of roughly 70 architects and engineers showed that more than two-thirds of those who would voice an opinion – 31 to 45 – believe political favoritism influences contract awards. . .

■Vote-buying flourishes to an extent incomprehensible to the public at large.

It is most pervasive in Eastern Kentucky, where it has been an integral part of the political system for generations. But it also occurs in other predominantly low-income areas of the state. Those who should know – profitting politicians and the vote-buyers themselves – estimate that up to half of the votes cast in certain precincts in some elections are bought.

As detailed in an accompanying story, a Courier-Journal reporter observed wide-spread vote-buying in several Magoffin County precincts on primary election day, and heard frank admissions that the law was being broken.

During just one three-year-period, 1980-82, the state police investigated allegations of vote fraud in 18 counties and concluded that illegal practices were large-scale, wide-spread and organized.

And about 40 percent of Eastern Kentucky residents think vote-buying is a problem, according to a recent poll conducted by The Courier-Journal.

Nevertheless, election-fraud indictments are infrequent and convictions rare, in part because some prosecutors profit from the system and most juries are reluctant to punish participants for a practice that is so ingrained and widespread.

An antiquated and highly politicized system of selecting election officer – who oversee voting at each polling place – helps perpetuate vote-buying. In some cases, these officers are either fixers themselves or friends or fixers.

Illicit cash in huge amounts plays a vital role in the electoral process.

No one knows how much cash flows in an election year, but politicians who take it and spend it estimate that the actual cost of some races is 50 percent to 100 percent higher than the figures actually reported.

The difference is cash: cash contributed because the donors either got something illicit in return or else didn't want their largess publicized; and cash spent by politicians on such illegal activities as buying votes. Cash donations in excess of $100 are illegal.

"You cannot win an election up here without election day money, and cash is all they use," Letcher Circuit Judge F. Byrd Hogg said.

During successful 1985 campaign for Perry County judge-executive, Sherman Neace reported spending more than $107,000.

Neace doled out nearly $92,000 of that amount in cash to about two dozen political operatives, who were told only that he wanted their support and to carry their precincts.

Darrel Fugate, one of the recipients and a well-known election manipulator of long standing, admits that he spent the $3,000 Neace gave him to buy votes.

From the *Courier-Journal* newspaper report on the same day, under the article headlined: "In Magoffin, Vote-buyers Help Pervert an Election."

Like an old-time Army paymaster, Don Bailey stands with a fistful of $5 and $10 bills as the crowd gathers eagerly around him.

Red-white-and-blue John Y. Brown Jr. Campaign buttons adorn Bailey's hat and hang from his shirt pockets. He is sweating.

A woman moves forward, thrusts out a hand and receives several bills.

It is primary election day, May 26, in Magoffin County.

Several hundred feet away, a line is forming in front of Lakeville's polling place, an unpainted wooden building with open windows and door.

As the voters advance one-by-one into the building, they are being watched through a window by a man standing outside.

Several times the observer, apparently approving of what he sees, turns and walks toward Bailey with someone who has just voted.

The observer points to the voter and nods. Bailey hands the voter a bill.

The scene is repeated several times before Bailey spots a reporter, whom he knows, in the crowd.

Just paying campaign workers, Bailey says.

Flat Fork

Two women and a man sit outside the Flat Fork polling place at Prater-Border School around 7 a.m. The polls have been open an hour.

"They're floaters," says Will Isaac, a strip-mine foreman and longtime resident of Coon Creek who agreed to be a tour guide for the day. "Floaters" are people who sell their votes to the highest bidder.

"How can you tell?"

"Well, you see, they're not voting," Isaac says. "They're just sitting around and waiting till the price goes up."

Isaac, who lives in the precinct and who claims to have bought a fair number of votes himself, talks to a few vote-buyers inside the school.

He returns a few minutes later.

"They're only offering $10 a vote," he reports.

Quoting Assistant Commonwealth's Attorney Ferrell Adkins, the article continues:

Adkins said harassment of voters by election officers has become commonplace, and he compared the situation in Magoffin County to that facing blacks in the South during the 1960s.

The only hope of having fair elections, he said, is for the vote to be monitored by someone from outside the county.

"I wish the federal government would do something because I don't expect the state to," he said. "It's getting so honest people are afraid to come to the polls."

From the October 12, 1987 Courier-Journal, page headlined: "Vote-buying is Rampant, and Open, in Some Areas"

"People not involved in vote fraud don't comprehend the magnitude," Pike County Judge-Executive Paul Patton said.

The practice of vote-buying is perpetuated by tradition and practicality. Candidates say they have to buy votes to get elected because their opponents are doing it. The sellers depend on the money, and many consider it their birthright to sell their votes.

The system is propped up by corrupt officials – election officers who allow vote-buying to go on in plain view at polling places and law-enforcement officials who wink at it.

Election laws do little to deter the practice. The maximum penalty for vote-buying is a $100 fine and 90 days

in jail; for vote-selling it's a fine of $500. But convicted offenders rarely get maximum sentences.

And since juries are reluctant to indict and convict transgressors in the first place, it's not surprising that vote-buying is, by some estimates, a problem in perhaps half of Kentucky's 120 counties.

A Way of Life

Fueled by hard cash – and sometimes by hard liquor – vote-buying is an industry that flourishes in areas where income and educational levels are low – and that covers a lot of territory in Kentucky.

As a result, thousands in Kentucky sell their votes to the highest bidder on election day.

In such elections, there are no real issues – other than which candidate has the most money to hand out. And the only favorites are $10 and $20 bills.

Families in some counties have been selling their votes for as long as anyone can remember, and unless there's money involved they won't vote.

"These people come to the polls and sit there from 6 a.m. till 6 p.m., and if they're not bought, they pack up...and go home without voting," said Ada Sue Register, a Martin County precinct worker.

Local prosecutors have shown little stomach for going after known vote-buyers or vote-sellers. And when they have obtained indictments, juries generally have been lenient.

"Honest people are getting uninterested in voting," said Will Isaac, who lives on Coon Creek in Magoffin County. "They're afraid to go to the polls."

Supreme Court, U.S.
FILED
SEP 22 2004
OFFICE OF THE CLERK

No. 04-103

In The
Supreme Court of the United States

GREGORY D. STUMBO, *et al.*,
Petitioners,
v.
HOBART WARD ANDERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

Brief in Opposition

James Bopp, Jr., *Counsel of Record*
Thomas J. Marzen
JAMES MADISON CENTER FOR
FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434

September 22, 2004

QUESTIONS PRESENTED

I. Whether the Sixth Circuit properly found (a) the scope of Kentucky's ban on electioneering within a 500-foot zone around polling places unconstitutional because the area of the ban is not reasonable and significantly impinges on rights to free speech and association, and (b) Kentucky's definition of "electioneering" is vague and so unconstitutionally overbroad because it bans even distribution of write-in instructions within Kentucky's campaign-free zone.

II. Whether the Sixth Circuit properly found Kentucky's ban on soliciting or receiving gubernatorial campaign contributions within 28 days of election, a feature of Kentucky's public election financing scheme intended to induce voluntary participation in the scheme, is unconstitutional as applied to write-in candidates, who are categorically ineligible to participate in the scheme.

III. Whether the Sixth Circuit properly found Kentucky's absolute ban on post-election contributions and its ban on gubernatorial candidates loaning more than $50,000 their campaigns are unconstitutional.

IV. Whether the Sixth Circuit properly found Kentucky's absolute ban on cash contributions to gubernatorial campaigns is unconstitutionally overbroad.

CORPORATE DISCLOSURE STATEMENT

Respondents are an individual, Hobart Ward Anderson, and Hoby for the Commonwealth, the slate of write-in candidates under which Hobart Ward Anderson was running. There are no other parent corporations for any Respondent, and no publicly held company owns ten percent or more of the stock of any of the Respondents.

TABLE OF CONTENTS

Alternative Questions Presented i

Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities v

Statement 1

A. Facts 1

B. Proceedings Below 1

Reasons for Denying the Petition 3

I. In Holding Kentucky's 500-Foot Electioneering Ban Unconstitutional, the Sixth Circuit Created No Genuine Circuit Split and Properly Held the Ban Overbroad for Banning Distribution of Write-In Instructions 3

A. The Sixth Circuit Properly Found the 500-Foot Ban Unconstitutionally Overbroad 3

B. The Sixth Circuit Created No Genuine Conflict of Circuits 7

C. The Definition of "Electioneering" Is Unconstitutionally Overbroad 9

II. No Circuit Split on the Validity of "Trigger Provisions" Was Created by the Sixth Circuit 12

III. No Split in Authority on Post-Election Contributions to Repay Candidate Loans Was Created by the Sixth Circuit 15

A. Post-Election Contributions 15

B. Candidates' Contributions to Their Own Campaigns 17

IV. The Sixth Circuit's Decision Holding Kentucky's Ban on Cash Contributions Does Not Raise a Substantial Federal Question 19

Conclusion 21

TABLE OF AUTHORITIES

Cases

Alaska v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999), cert. denied, 528 U.S. 1153 (2000) 15-16

Anderson v. Spear, 356 F.3d 651 (6th Cir. 2003) ..... passim

Anderson v Spear, 189 F. Supp. 2d 644 (E.D. Ky. 2002) ... 1

Boos v. Barry, 485 U.S. 312 (1988) 8

Buckley v. Valeo, 424 U.S. 1 (1976) 3, 9, 18, 20

Burson v. Freeman, 504 U.S. 191 (1992) 3-6, 8, 10-11

Calcheera v. Procarione, 805 F. Supp 716 (E.D. Wis. 1992) 8

Daggett v. Comm'n on Governmental Ethics and Election Practices, 205 F.3d 445 (1st Cir. 2000) 13

Ferre v. Florida ex rel Reno, 478 So. 2d 1077 (Fla. App. 1985, aff'd , 494 S.2d 214 (Fla. 1986), cert. denied, 481 U.S. 1037 (1987) 15-17

Franks v. City of Akron, 290 F.3d 813 (6th Cir. 2002), cert. denied, 537 U.S. 1160 (2003) 19

Gable v. Patten, 142 F.3d 940 (6th Cir. 1998), cert. denied, 537 U.S. 1160 (2003) 12-13

McConnell v. Federal Election Comm'n, 124 S. Ct. 619 (2003) 3, 9

Mills v. Alabama, 384 U.S. 214, 218 (1966) 4

Munro v. Socialist Workers Party, 479 U.S. 189 (1986) .....

Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996), cert. denied, 520 U.S. 1229 (1997) 13

Schirmer v. Edwards, 2 F.3d 117 (5th Cir. 1993), cert denied, *511 U.S.1017 (1994)* 7

Schirmer v. Edwards, No. 92-3900 (5th Cir. Oct. 29, 1992) 8

State v. Schirmer, 646 So.2d (La. 1994) 8, 11

Constitution, Statutes, Regulations & Rules

KRS § 117.235 9

KRS 117.235(3) 3

KRS § 121.150(3) 17

KRS § 121.150(16) 15

KRS § 121.150(24) 12

KRS § 121A.010(11)(a) 12

KRS §121A.030 12

KRS §121A.030(5) 12

KRS § 121A.030(5)(a) 12

KRS § 121A.050(2) 19

STATEMENT

A. Facts.

Anderson incorporates by reference the the facts as stated throughout the opinion of the Court of Appeals, *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2003); App. at 3a. Anderson will otherwise state any additional necessary facts as necessary within the Argument.

B. Proceedings Below.

Respondent Hobart "Hoby" Anderson was a write-in candidate in Kentucky's 1999 gubernatorial election. Anderson and his campaign committee, "Hoby for the Commonwealth," brought this action in the United States District Court for the Eastern District of Kentucky against the Kentucky Attorney General, the members of the Kentucky Board of Elections, the members of the Kentucky Registry of Election Finance, and several state prosecutors, all in their official capacities. They sought to enjoin enforcement of certain Kentucky election and campaign finance statutes, including, as relevant here, Kentucky's 500-foot polling place ban on electioneering, it definition of "electioneering," its ban on any solicitation or receipt of contributions within 28 days of an election, its $50,000 limit on candidates' loans to their campaign committees, its ban on all post-election contributions, and its ban on all cash contributions.

Following the submission of cross-motions for summary judgment, the District Court rejected all of Anderson's challenges. *Anderson v Spear*, 189 F. Supp. 2d 644 (E.D. Ky. 2002); App. at 53a. The United States Court of Appeals for the Sixth Circuit reversed in part. Relevant to the Petition presently before this Court, the Sixth Circuit:

1) held unconstitutionally overbroad Kentucky's 500-foot campaign-free zone both because it "prohibits speech over too much geography" and because "it prohibits more speech than necessary to meet the State's protected interests." 366 F.3d at 666; App. at 29a;

2) held unconstitutionally overbroad Kentucky's 28-day ban on contributions before an election as applied to write-in candidates, 356 F.3d at 674-75; App. at 45a-49aa, while it upheld the Kentucky public election financing scheme as a whole and the "trigger provisions" of Kentucky law. 356 F.3d at 675-77; App. at 49a-52a.

(3) held unconstitutional Kentucky's ban on candidates' soliciting or accepting post-election political contributions, and its law limiting to $50,000 candidates' loans to their own campaigns, as "significantly imping[ing] upon a candidate's ability to deliver and to time his or her message." 356 F.3d at 670-673; App. at 40a, 45a; and

(4) struck down the ban on cash contributions as "not closely drawn to avoid unnecessary abridgement of associational freedoms." 356 F.3d at 672; App. at 42a.

Kentucky's petition for rehearing or rehearing en banc was denied. The Attorney General joined by the Kentucky Board of Elections now petition for writ of certiorari. The Kentucky Registry of Election, which defended the challenged portions of Kentucky law below other than Kentucky's ban on electioneering within 500-feet of polling places, chose not to participate in petitioning for writ of certiorari.

REASONS FOR DENYING THE PETITION

I. In Holding Kentucky's 500-Foot Electioneering Ban Unconstitutional, the Sixth Circuit Created No Genuine Circuit Split and Properly Held the Ban Overbroad for Banning Distribution of Write-In Instructions.

The decision of the Sixth Circuit holding Kentucky's 500-foot ban on polling place electioneering, KRS 117.235(3), unconstitutional follows this Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992), follows *Buckley v. Valeo*, 424 U.S. 1 (1976), and *McConnell v. Federal Election Comm'n*, 124 S. Ct. 619 (2003), and it creates no genuine conflict of Circuits.

Notably, the Sixth Circuit struck down the 500-foot ban on electioneering on two separate and alternative grounds: both because the ban's 500-foot geographical sweep is unconstitutionally overbroad, 356 F.3d at 656-64; App. at 8a-23a, and because its definition of "electioneering" is unconstitutionally overbroad insofar as it bans distribution of even voter write-in instructions. 356 F.3d at 664-67; App. at 23a-29a. Thus, acceptance of the 500-foot issue for review would entail a decision that *both* of these grounds for striking down the ban raise substantial federal questions if the Sixth Circuit decision is to be reversed in this regard. As Anderson will show, however, neither aspect of the Sixth Circuit decision warrants review.

A. The Sixth Circuit Properly Found the 500-Foot Ban Unconstitutionally Overbroad.

Neither the Sixth Circuit nor Anderson dispute that to protect the right to vote, there are compelling state interests in "preventing voter intimidation and election fraud," 356 F.3d at 656; App. at 10a (citing *Burson*, 504 U.S. at 206), or that these interests justify some restriction on the scope of polling place campaigning. Nevertheless, any such restriction impinges on the right to

political speech, and "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Burson*, 504 U.S. at 196 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Thus, state action to protect the right to vote comes into potential conflict with the right to free speech in the context of polling place campaign-free zones.

In such cases, as here, where "the challenged activity physically interferes with electors attempting cast their ballots," a "modified burden of proof" applies. *Burson*, 504 U.S. at 209 n.11. Under this standard, a polling place political speech ban will be given deference, but only "so long as it is reasonable and does not '*significantly impinge* on constitutionally protected rights.'" 356 F.3d at 656; App. at 11a (quoting *Burson*, 504 U.S. at 209, and *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (emphasis in original)). "At some measurable distance for the polls . . . governmental regulation of vote solicitation could effectively become an impermissible burden," rendering it unconstitutional. *Burson*, 504 U.S. at 210 (citing *Mills v. Alabama*). As the Sixth Circuit held, the Kentucky 500-foot ban exceeds this measurable distance.

Kentucky's previous 50-foot "campaign-free zone" covered an area of 7,850 square feet. The Tennessee 100-foot zone at issue in *Burson* covers an area of 31,400 square feet. But the 500-foot zone at issue here covers 785,000 square feet – over 18 acres and 100 times the area circumscribed by Kentucky's previous 50-foot zone, and 25 times the area circumscribed by Tennessee's 100-foot zone.

Further, "it takes approximately 15 seconds to walk 75 feet." *Burson*, 504 U.S. at 210 (quoting *Burson v. Freeman*, 802 S.W.2d 210, 215 (Tenn. 1990)). By this measure, it would have taken 10 seconds to walk through the old 50-foot Kentucky zone.

It takes 20 seconds to walk through the 100-foot Tennessee zone. And it would take 100 seconds or almost 2 minutes to walk through the 500-foot zone at issue here – 10 times longer to walk to the polling place than Kentucky's old 50-foot zone required and about 5 times longer than to walk the 100-foot Tennessee zone requires.

Finally, under the old 50-foot Kentucky ban, free speech prevailed around a 314 foot circumference about the polling place. Under the 100-foot Tennessee ban at issue in *Burson*, it prevails about a 628 foot circumference. But under the challenged 500-foot ban at issue here, there is a 3,140 foot circumference – diluting 100 times the potential access of speaker to listener and of listener to speaker that obtained under the old 50-foot Kentucky ban.

Thus, Kentucky's "campaign-free zone" far exceeds the relatively "minor geographic limitation" at issue in *Burson*. *Id.* It "significantly impinge[s] on constitutionally protected rights" in violation of the modified *Burson* standard. 504 U.S. at 209.

Moreover, the Kentucky ban is not "reasonable," as the *Burson* standard also requires. *Id.* A speech-free zone that encompasses over 3/4 million square feet is obviously not needed to prevent such crowding at polling places that "physically interferes" with the ability to vote.

Nor is such an expansive zone proven necessary to prevent voter corruption or intimidation, as the careful factual deconstruction of these claims by the court of appeals demonstrates. 356 F.3d at 657-63; App. at 12a-23a. Indeed, the record is so devoid of a reasonable justification for the 500-foot ban that the Sixth Circuit suggested that what evidence of intent there is suggests that the "extreme geographic distance was not selected for . . . permissible purposes, but to prevent voters from being bothered by constitutionally protected speech." 356 F.3d at 662;

App. at 20a. To the extent that this is true, the ban cannot even be said to serve a legitimate, much less compelling, state interest and thus must be held unconstitutional for this reason alone.

Petitioners sole argument to counter the Sixth Circuit's analysis of the facts in concluding that interests in prevention of corruption and intimidation are not reasonably served by the 500-foot ban is their general claim that the appellate court failed to pay sufficient deference to the legislature in view of a history of polling place abuse. Petition for Writ of Certiorari ("Petition") at 18-20. In fact, however, the Sixth Circuit was quite plainly prepared to defer to legislative judgment, as indicated by its repeated invocation of the *Burson* Court's modified standard for determining whether the scope of a campaign-free zone passes constitutional muster – a standard that itself incorporates and demands legislative deference.

Moreover, it does not follow that a required degree of deference to legislative judgment demands abject acquiescence. And the Petitioners offer no facts to counter the Sixth Circuit's determination that state interests in preventing corruption and intimidation are not reasonably served by a 500-foot ban on political speech.

Petitioners also suggest that the history of Kentucky polling place corruption justifies its campaign-free zone, Petition at 7a, 16a – corruption that is all too common in the United States and throughout the world. *Burson*, 504 U.S. at 205-07. Certainly, the prospect of intimidation and fraud supports *some* campaign-free zone around polling places, as this Court allowed in upholding Tennessee's 100-foot zone. But Kentucky's zone is 25 times larger than Tennessee's, and there is nothing in the record to suggest that the level of polling place corruption in Kentucky is 25 times greater than in Tennessee – or that increasing the scope of Tennessee's ban on political speech by 25 times would

markedly diminish polling place intimidation or fraud beyond what a 100-foot ban achieves. Kentucky's 500-foot ban simply amounts to legislative over-kill of constitutionally protected free speech rights.

As *Burson* held, it is inappropriate to apply any "litmus-paper test" to separate valid form invalid laws regulating campaign-free zones. *Burson*, 504 U.S. at 210-11. Instead, analysis must proceed on a case-by-case basis to determine whether a campaign-free zone satisfies the "reasonable and without significant impingement" test that *Burson* announced. Here, the Sixth Circuit found that Kentucky's 500-foot ban failed this test, and its balanced judgment in this regard does not present an important federal question warranting review by this Court.

B. The Sixth Circuit Created No Genuine Conflict of Circuits.

Petitioners also claim that there is a live conflict in post-*Burson* circuits created by the Sixth Circuit because it struck down Kentucky's 500-foot ban on polling place political speech, while the Fifth Circuit earlier upheld Louisiana's 600-foot ban in *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert denied*, 511 U.S.1017 (1994). The sole factual basis of the Fifth Circuit decision was the expansion of its 300-foot ban to 600 feet after the Louisiana legislature concluded that the 300-foot ban did not prevent the hiring of poll workers. 2 F.3d at 122. Petition at 21.

Subsequent to the Fifth Circuit decision in *Schirmer*, however, the Louisiana Supreme Court, after far more extensive and careful scrutiny of the factual record, held the Louisiana 500-foot ban unconstitutionally overbroad under the U.S. Constitution. *State v. Schirmer*, 646 So.2d (La. 1994). There is thus no live post-*Burson* circuit conflict with regard to the constitutionally of any campaign-free zone ban, much less a ban

that is 500 feet or more. *See also Calcheera v. Procarione*, 805 F. Supp 716 (E.D. Wis. 1992) (Wisconsin's 500-foot campaign-free zone violates standards established in *Burson*).[1] Even if a conflict between the results in the Fifth and Sixth Circuits is perceived to continue to exist, it arises as the result of differing evaluation of different factual records, rather than on the basis of any conflict in the interpretation of the legal principles announced in *Burson*.

Moreover, as the Louisiana Supreme Court noted, the Fifth Circuit decision in *Schirmer* "departed from the prior finding of the state district court under review here, as well as from the reasoning of the prior Fifth Circuit panel [in *Schirmer v. Edwards*, No. 92-3900 (5th Cir. Oct. 29, 1992)] which had granted Schirmer and plaintiffs an injunction. . . ." 646 So.2d at 896. If the Louisiana Supreme Court did not find the Fifth Circuit decision in *Schirmer* either persuasive or implicitly binding with regard to the federal constitutional question it decided, the difference between the Sixth Circuit decision here and the Fifth Circuit in *Schirmer* does not present a conflict sufficiently fresh or sharp to warrant review by this Court.

C. The Definition of "Electioneering" Is Unconstitutionally Overbroad.

The Sixth Circuit also held Kentucky's 500-foot ban on "electioneering" unconstitutionally overbroad because, "absent a narrowing construction, it prohibits more speech than is necessary to meet the State's protected interest[s]" in preventing

---

[1]There are numerous pre-*Burson* decisions striking down speech-free zones. *See Burson*, 504 U.S. at 223 (Stevens, J., dissenting). *See also Boos v. Barry*, 485 U.S. 312, 323-24 (1988) (ordinance prohibiting political protest within 500 feet from a foreign embassy was not narrowly tailored but far too broad to protect diplomatic personnel from threats, intimidation, and harassment).

polling place intimidation and fraud. 356 F.3d at 666; App. at 29a.

KRS § 117.235 defines "electioneering" as "the displaying of signs, the distribution of campaign literature, cards, or handbills. . . [,]" and "the Kentucky State Board of Elections has chosen a broad[] – indeed, overbroad – interpretation of the statute in finding that instructions on how to cast an absentee ballot constitute electioneering." 356 F.3d at 666; App. at 26a-27a. The Sixth Circuit deemed the distinction between "express advocacy" and "issue advocacy" recognized by this Court in *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52 (1976), viable and necessary in the context of the vagueness and overbreadth of the definition of "electioneering" in the Kentucky ban. 356 F.3d at 665; App. at 24a. It thus held that the definition of "electioneering" was unconstitutionally overbroad for failure to exclude "issue advocacy" – including distribution of information on write-in voting – from the speech banned within 500 feet of polling places.

Petitioners claim that the distinction between "express advocacy" and "issue advocacy" was abolished in principle by *McConnell v. Federal Election Comm'n*, 124 S. Ct. 619, 689 (2003). Petition at 15-16. This is simply not the case. The *McConnell* Court found only that substantial evidence had shown that the distinction had become "functionally meaningless" when statutory language of is not vague, as in the context of the Federal Election Campaign Act. *Id.* The express/issue advocacy distinction remains valid in the context of a vague statute. And here, not only is Kentucky's definition of "electioneering" vague, but Kentucky "failed to provide any evidentiary support for regulating both express and issue advocacy" in the context of polling place speech. 356 F.3d at 665; App. at 27a. Specifically, it failed to demonstrate that there was any danger that mere distribution of how-to instructions on write-in voting,

as Anderson wished to do, leads to or implicates election fraud or intimidation of voters. So it impossible to see how it is both "reasonable" and does not "significantly impinge" on freedom of speech – the showing required to justify restrictions on campaign-zone speech under *Burson* – to ban such speech.

Apparently conceding that speech on write-in instructions or advocacy of issues like "support our schools" – an example the Sixth Circuit suggests, 356 F.3d at 665; App. at 28a – would not directly implicate state interests in prevention of intimidation and fraud, the Petitioners suggest that issue advocacy would become a subterfuge for expressly advocating the election of candidates. Petition at 16. Such a rule, they claim, would "eviscerate campaign free zone laws by enabling corrupt vote buyers and sellers to gain close proximity to the nations' [sic] polling places, under the guise of claiming a right to engage in 'issue advocacy.'" *Id.* They further argue that specific laws against violence, intimidation, and bribery are insufficient – that a prophylactic statute banning all speech in the vicinity of polling places is necessary to secure elections from corrupt activities. *Id.* at 16-17.

Petitioners' argument is based on sheer speculation. Moreover, it strains credibility to claim that vote buyers and enforcers would or reasonably could masquerade as purveyors of write-in instructions or as advocates urging voters to "save our schools," then mix their message to passing voters in order to induce them to sell their votes or to strong-arm them into voting for a particular candidate. In this regard, Petitioners' argument is akin to a claim that a zone of absolute silence must be maintained within a certain distance of polling places in view of the danger that to allow any speech at all would pose the potential danger of vote buying and intimidation. Such a claim would obviously be deemed to fail the "reasonable" prong of the Burson test, and so does claim that issue advocacy may be constitutionally banned

from Kentucky's campaign-free zone.

There is a potential legitimate concern that crowds of "issue advocates" could, simply by their presence, "physically interfere" with voter access to the polls. But a 500-foot ban on issue advocacy is not reasonably necessary to address this concern, any more than such an extensive ban is necessary to prevent advocates of voting for particular candidates from crowding entrances to polling places. Kentucky's definition of "electioneering" in the context of its 500-foot ban operates to effectively prohibit any and all political speech within over 18 acres around polling places, even political speech like "support our schools" that may not relate to any matter on the ballot. As the Louisiana Supreme Court held with regard to that state's 600-foot ban, "extending a *total* ban on political speech to a distance of 600 feet from polling places, the resulting limitation of free speech at that point overburdens or 'significantly impinges' First Amendment freedoms." *State v. Schirmer*, 646 So.2d at 902 (emphasis in original).

Just as Kentucky's 500-foot ban on campaigning is geographically overbroad, its definition of "electioneering" is overbroad in that it bans all manner of political speech within its 500-foot zone. Petitioners presented no evidence to support that it is reasonable or does not significantly impinge on Anderson's free speech rights. No substantial federal question is presented in this regard.

II. No Circuit Split on the Validity of "Trigger Provisions" Is Created by the Sixth Circuit.

Petitioners' request for review of what they characterize as the Sixth Circuit's "invalidating Kentucky's campaign finance law trigger provisions," Petition at 21, seems to misapprehend the nature of the Sixth Circuit's decision. Kentucky's "trigger provision lifts the contribution cap for candidates participating

in the public finance system, and eliminates the 28-day window restricting contributions for all candidates. KRS § 121.A.030(5)(a)." 356 F.3d at 676; App. at 51a. But the Sixth Circuit specifically *upheld* the "trigger provisions" against Anderson's both facial and as applied attack, acknowledging it was bound by a previous decision in *Gable v. Patten*, 142 F.3d 940, 949 (6th Cir. 1998), *cert. denied*, 537 U.S. 1160 (2003). *See* 356 F.3d at 676; App. at 51a. Moreover, it *upheld* Kentucky's public finance system as a whole against Anderson's as applied attack. 356 F.3d at 675-76; App. at 49a–51a. Thus, there is neither an internal nor external circuit conflict in such regard, as the Petitioners seem to argue. Petition at 23.

The only features of Kentucky law relating public financing of elections at all that the Sixth Circuit held unconstitutional – and then only as applied to write-in candidates – are provisions that prohibit all candidates from receiving contributions in the final 28 days preceding an election, whether or not the candidate is participating in Kentucky's public election financing scheme, KRS §§ 121.150(24) and 121A.030(5). *See* 356 F.3d at 674-75; App. at 45a-49a. The 28-day threshold relates to Kentucky's trigger provisions only insofar as the trigger provisions suspend the 28-day ban on receipt of contributions for gubernatorial candidates who participate in Kentucky's public financing scheme when any candidate who does not participate in the scheme receives contributions of $1.8 million from any source. KRS §§ 121A.010(11)(a) and 121A.030. The Sixth Circuit decision does not at all affect the trigger provisions' other function of lifting the contribution limit for all candidates who participate in the scheme when any candidate receives more than $1.8 million.

Presumably, therefore, Petitioners seek review of only that part the decision that holds unconstitutional the 28-day ban on receipt of contributions to write-in gubernatorial candidates.

Indeed, this is the only aspect of the decision that they can petition this Court to review that relates to Kentucky's public financing scheme. Anderson thus addresses this aspect of the Petition from this perspective.

The purpose of Kentucky's public election financing scheme[2] is to encourage candidates for political office to participate in the program by providing those who do with public campaign funds, while, at the same time limiting the amount of contributions that the candidate can receive as a condition of receipt. However, any financial advantage that scheme participants might gain would be lost if non-participating candidates could outspend participating candidates, while participating candidates would remain bound by their contribution limits. Thus, the 28-day threshold on receipt of contributions that applies to all candidates is released for all candidates if any candidate receives more than $1.8 million – and candidates can continue to receive funds during that time. The 28-day threshold is provided to allow Kentucky authorities time to determine whether the amount has been exceeded and candidates time to receive and spend funds if it has been. It is this general scheme that was previously upheld by the Sixth Circuit in *Gable v. Patton*, 142 F.3d at 949, and other circuits in *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1541 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997), and *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 469 (1st Cir. 2000).

But the Sixth Circuit decision at issue here in no way conflicts with these decisions. None of them purport to address the quite narrow issue addressed by the Sixth Circuit: whether

---

[2]No public funds have been presently allocated to fund the Kentucky public election financing program, so the program is inoperative now, as it was when the Sixth Circuit rendered its decision. *See* 356 F.3d at 654-56; App. at 5a-8a.

such schemes are unconstitutional *as applied to write-in candidates who are categorically prohibited to participate in the scheme at all*. If the purpose of the scheme is to encourage non-participants to participate in the scheme in service to state interests in prevention of corruption or the appearance of corruption of public officials, then it makes no sense to impose the scheme's 28-day requirement on write-in candidates who cannot participate in the scheme. That is, there is no rational, much less significant or compelling, relationship between the scheme's 28-day contribution limit *as applied to write-in candidates* and the state's interests that the scheme purports to serve.

Further, there is no reason to penalize write-in candidates by imposing the 28-day limit on them for the sake of the scheme itself. As the Sixth Circuit observed, candidates would have an added incentive not to participate when the 28-day limit does not apply to write-in candidates only if eligible candidates surmised that a "write-in candidate would fail to collect more than $1.8 million before the 28-day window closed, but would substantially outstrip [them] in contributions in the final 28 days. This is a highly unlikely scenario at best." 356 F.3d at 675; App. at 48a.

In sum, there is no conflict between circuits created by the Sixth Circuit decision, and there is certainly no substantial federal question presented by a decision that narrowly exempts only categorically ineligible write-in gubernatorial candidates from Kentucky's ban on receipt of contributions within 28 days of elections. The Court should deny review of this issue.

III. No Split in Authority on Post-Election Contributions to Repay Candidate Loans Was Created by the Sixth Circuit.

The Sixth Circuit struck down Kentucky's ban on soliciting or accepting contributions after an election of KRS § 121.150(16). *See* 356 F.3d at 670-71; App. at 40a-43a. It also struck down Kentucky's ban on candidates for Governor and Lieutenant-Governor making loans to their own campaigns over $50,000 of KRS §§ 121.150(13) and (21). *See* 356 F.3d at 672-73; App. at 43a-45a.

Petitioners' "Question Presented III" suggests that they wish this Court to review both of these aspects of the Sixth Circuit decision, though their argument focuses on a claimed split of authority created by the Sixth Circuit's decision striking down Kentucky's post-election contribution ban and decisions of the Alaska Supreme Court and a Florida Court of Appeals upholding post-election contribution bans in *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 630 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000), and *Ferre v. Florida ex rel Reno*, 478 So. 2d 1077, 1079 (Fla. App. 1985, *aff'd* , 494 S.2d 214 (Fla. 1986), *cert. denied*, 481 U.S. 1037 (1987). *See* Petition at 26. There is no even potential conflict of circuits or authorities with regard to the Sixth Circuit's decision striking down Kentucky's $50,000 limit on candidates' loans to their own campaigns on its face.

A. Post-Election Contributions.

First, there may be a special interest in preventing the appearance of corruption that might justify certain greater constraints on post-election contributions than on pre-election contributions in the interests of avoiding corruption and the appearance of corruption, as the Alaska and Florida courts suggest. But the Kentucky ban on post-election contributions is absolute – a zero contribution limit – and it applies to both

winning and losing candidates.

As the Sixth Circuit observed, this absolute ban on post-election contributions is not "closely drawn" to satisfy the state interests at stake. 356 F.3d at 670; App. at 38a-39a. In every election, 50% or more of candidates will lose and thus cannot be sources of official corruption or the appearance of official corruption due to receipt of post-election contributions. So a statute that bans all post-election contributions for all candidates cannot be rationally, much less closely, related to the state's interests at stake since it *always* restricts the free speech of as many or more candidates who cannot violate the state interests than it restricts the speech of those who can.

Petitioners' claim that the absolute ban is nevertheless justified because "[l]osing candidates often hold or seek other public offices and can be expected to exert great pressure on business people and regulated industries." Petition at 27. But this is an argument in favor of prohibiting any elected official or aspirant to public office from ever soliciting or receiving contributions at any time, not simply during some post-election period, whoever that might be defined.

Second, Petitioners' claim that there is a "conflict of authority" overstates the nature of the disagreement between the Sixth Circuit and the Alaska and Florida state courts. The Alaska decision in this regard consists of only two conclusory sentences. *See Alaska v. Alaska Civil Liberties Union*, 978 P.2d at 630. It hardly presents a sharp, well-developed conflict with the Sixth Circuit's decision.

The particular concern expressed by Florida decision in *Ferre* is that "a candidate could make large expenditures, secure in the knowledge that immediately after the election members of some currently unpopular group whose support for candidate had not theretofore been disclosed would send in contributions," thus

providing no notice to voters who would not have voted for the candidate with such bedfellows. *Ferre*, 487 So. 2d at 1080. In Kentucky, however, the $1,000 contribution limit of KRS § 121.150(3) significantly mitigates any potential for voter concern that a candidate may peddle post-election influence to a "surprise" large contributor. The $1,000 limit assures voters that no single contributor will exercise undue influence on now-elected official through an excessively large contribution.

The Florida court neither addressed the impact of contribution limits nor imposition of a ban on post-election contributions to both winners and losers as the Sixth Circuit did. Again, as with *Alaska*, *Ferre* does not present a case in which the issues are sufficiently explored to justify review based on a conflict of authorities. At the very least, further development of the law should occur before discretionary Supreme Court review is warranted.

A concern over the appearance of corruption cannot justify a total ban on contributions after an election any more than it can before an election. A special interest in preventing the appearance of corruption due to post-election contributions might justify a more narrowly tailored solution – such as a lower contribution limit for contributions made to winners after elections than the $1,000 ceiling imposed on pre-election contributions. But the Kentucky zero contribution post-election rule applied to both winners and losers goes too far. In this regard, the Sixth Circuit's decision does not raise a substantial federal question.

B. Candidates' Loans to Their Own Campaigns.

To the extent that the Petitioners seek review of the Sixth Circuit's decision holding the $50,000 limitation on candidate loans to their own campaigns unconstitutional, it appears to be on the grounds that lifting the loan limitation, when coupled with

lifting the ban on post-election contributions, presents a special opportunity for quid pro quo corruption or apparent corruption. Petition at 25. Petitioners nowhere contest the Sixth Circuit's reasoning in arriving at the conclusion that Kentucky's loan limitation is unconstitutional on its face under *Buckley* because loans are expenditures and *Buckley* holds that candidates' own expenditures on their own campaigns cannot be limited. *See* 356 F.3d at 672; App. at 43a.

If the $50,000 loan limit is unconstitutional on its face, however, then there is no particular circumstance in which it is constitutional. Thus, Petitioners' argument seems to be directed toward bolstering its claim that the Sixth Circuit's holding that Kentucky's post-election contribution ban is unconstitutional should be reviewed rather than toward urging review of the Sixth Circuit's ruling against Kentucky's $50,000 loan limitation.

In any event, lifting the lid on candidates' loans to their own campaigns does not logically increase the prospect of post-election corruption or the appearance of corruption because Kentucky's $1,000 contribution limitation defuses the prospect that any single contribution or potential "bundle" of contributions can buy the influence of a winning candidate. To the extent that a candidate makes a loan to her campaign in excess of $50,000 that is not repaid before an election, then post-election repayment would simply require a greater number of $1,000 contributions – thus weakening rather than strengthening any potential influence or perception of influence that any individual post-election contributor might have on a winning candidate. The effect increases exponentially when contributions that pay post-election loan debts are made to losing candidates.

The Sixth Circuit was clearly correct in refusing to sustain Kentucky's $50,000 loan limit on this basis. Certainly, no substantial federal question is raised by this narrow issue.

IV. The Sixth Circuit's Decision Holding Kentucky's Ban on Cash Contributions Does Not Raise a Substantial Federal Question.

Finally, Petitioners, Petition at 28a, request review of the Sixth Circuit's holding that Kentucky's total ban on cash contributions to candidates for Governor and Lieutenant Governor of KRS § 121A.050(2) is unconstitutional. 356 F.3d at 671-72; App. at 40a-42a. They claim that without reversal, "states within the Sixth Circuit will be precluded from requiring political donations to campaigns be made by check or money order," and hence "hampered in their investigations of illegal slush funds used to by votes, or engage in violations of campaign finance laws." Petition at 29. They also claim that Kentucky's "notorious history of political corruption" justifies its absolute ban on cash contributions in gubernatorial elections. *Id.*

In another decision that the panel in this case did not purport to overrule, the Sixth Circuit has upheld a ban on cash contributions over $25 on the grounds that it "serves the significant governmental interest of accountability by forcing contributions to be traceable." *Franks v. City of Akron*, 290 F.3d 813, 818 (6th Cir. 2002), *cert. denied*, 537 U.S. 1160 (2003). Thus, it is hardly the case that Sixth Circuit states will be altogether precluded from requiring even rather small contributions from being traceable through check or money order.

Moreover, as the appellate court observed, "to the extent that Kentucky's interest in preventing corruption descends to the smallest contributions, the State could have easily promoted disclosure by requiring campaigns to take the name of the person making the contribution." 356 F.3d at 672; App. at 42a. Requiring some form of personal identification might also be required.

An *absolute* ban on cash contributions strongly discourages those usually poorer citizens who do not have access to credit

cards, money orders, or checks available, or who are loathe to pay the extra costs involved in their use, from contributing to campaigns. It strongly discourages those citizens who only wish to or are able to make some small contribution to a campaign – as opposed to the wealthy who are willing and able to make the large contribution that truly poses a threat of actual or apparent corruption. Moreover, it disproportionately penalizes those candidates, like most write-in and third-party candidates, who rely principally on small contributions to sustain their campaigns. Anderson, for example, objected to the total ban because it made it nearly impossible to sell snow cones, water bottles, t-shirts, and other inexpensive merchandise at fairs and flea markets to raise campaign money.

Whatever benefit there might be in making such small contributions somewhat more easily traceable is clearly outweighed by the special burden on the exercise of associational rights that it imposes on the very citizens and candidates who are least likely to pose a threat of actual or apparent official corruption. Although discretionary latitude should be provided to government on the amount of a cash contribution that a government could properly demand be more easily traceable, the $0 cash contribution ban at issue here does not even purport to attempt to apply the "closely drawn" requirement that *Buckley v. Valeo*, 424 U.S. at 25, demands in this context.

Petitioners' reliance on the claimed especially corrupt history of Kentucky elections adds little in favor of review by this Court. The ban on all cash contributions applies only to gubernatorial elections, but the Petitioners have not shown that gubernatorial campaigns uniquely or especially rely on small cash contributions to fuel their corruption. Indeed, in state-wide gubernatorial campaigns, small cash contributions are likely to play a greatly diminished role compared to the large contributions that the power of the Governor is likely to attract.

There is no conflict of circuits or even any internal circuit conflict on this matter. The insubstantial contributions involved do not raise a substantial federal question. Review of the Sixth Circuit decision should be denied in this regard.

Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

James Bopp, Jr., *Counsel of Record*
Thomas J. Marzen
JAMES MADISON CENTER FOR
FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 (fax: 812/235-3685)
Counsel for Respondents

(2)

No. 04-103

FILED
SEP 2 2 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GREGORY D. STUMBO, *et al.*,

Petitioners,

v.

HOBART WARD ANDERSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, COMMON CAUSE OF KENTUCKY, AND THE NATIONAL VOTING RIGHTS INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONERS

DEBORAH GOLDBERG
Counsel of Record
ADAM H. MORSE
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York NY 10013
(212) 998–6730

Counsel for Amici Curiae

189896

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interests of the *Amici Curiae*	1
Summary of Argument	1
Argument	3
I. The Sixth Circuit's Decision Throws Campaign Finance Law Into Disarray.	3
A. The Opinion Below Threatens Public Finance Systems Around the Nation.	3
B. Sixth Circuit Doctrine Confers Unprecedented and Unjustifiable Privileges on Self-Financed Candidates	7
II. Review Is Warranted to Protect States' Power to Prevent Public Officials from Demanding Gifts from People with Business before the Government.	11
III. Federal Courts Should Not Construe State Laws to be "Functionally Meaningless."	15
Conclusion	20
Appendix A	1a
Appendix B	2a

TABLE OF CITED AUTHORITIES

Cases: *Page*

Anderson v. Spear, 356 F.3d 651 (6th Cir. 2004) ... *passim*

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 18

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 19

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 19

Buckley v. Valeo, 424 U.S. 1 (1976) 8, 18

Calif. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088 (9th Cir. 2003) 15

Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 19, 20

Daggett v. Comm'n on Gov'tal Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000) 5, 6, 7

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) 7

FEC v. Lance, 617 F.2d 365 (5th Cir. 1980) 13

Federal Trade Comm'n v. MTK Mktg., Inc., 149 F.3d 1036 (9th Cir. 1998) 19

Cited Authorities

Page

Ferre v. State, 478 So. 2d 1077 (Fla. Dist. Ct. App. 1985), *adopted*, 494 So. 2d 214 (Fla. 1986) 12, 13

Gable v. Patton, 142 F.3d 940 (6th Cir. 1998) ... 3, 8, 9, 10

La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) 18

Majors v. Abell, 317 F.3d 719 (7th Cir. 2003) 18

McConnell v. FEC, 124 S. Ct. 619 (2003) ..... *passim*

Opinion of the Justices, 637 N.E.2d 213 (Mass. 1994) 12

Pharm. Research & Mfrs. of Amer. v. Concannon, 249 F.3d 66 (1st Cir. 2001) 19

Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996) 7

R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941) 18

State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999) 11-12, 13

United States v. Sun-Diamond Growers of Cal., 941 F. Supp. 1277 (D.D.C. 1996) 13

Cited Authorities

Page

United States Constitution:

First Amendment 7, 8, 12, 19

Statutes:

26 U.S.C. § 9004 6

26 U.S.C. § 9034 ..... 5, 6

Ariz. Rev. Stat. § 16-952 6

Cal. Gov't Code § 85307(b) 12

Ky. Rev. Stat. § 121A.010(13) 17

Ky. Rev. Stat. § 121A.030 6

Ky. Rev. Stat. § 121A.080 ..... 5, 6

Mich. Comp. Laws § 169.264 6

Mich. Comp. Laws § 169.265 6

N.C. Gen. Stat. §§ 163-278.61 *et seq.* 6

Neb. Rev. Stat. § 32-1604 6

Neb. Rev. Stat. § 32-1606 6

Cited Authorities

	Page
N.Y.C. Admin. Code § 3-705(2)	5
H.R. 3617, § 4(d)	4
S. 1913, § 4(d)	4
Rule:	
Ky. R. Civ. P. 76.37	19
Other Authorities:	
B. Drummond Ayres Jr., *With Leaders Leaving Office for Jail, Ky. Works to Refurbish Image*, N.Y. Times, Sept. 19, 1993	14
James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Still Not a Loophole: Examining* McConnell*'s Exception to* Buckley*'s General Rule Protecting Issue Advocacy*, 31 N. Ky. L. Rev. 289 (2004)	17
Rick Bragg, *Ex-Gov. of La. Gets 10 Years*, N.Y. Times, Jan. 9, 2001	14
Monica Davey, *Former Gov. Ryan of Ill. Is Indicted on Graft Charges*, N.Y. Times, Dec. 18, 2003	14
Shaila K. Dewan, *Former Gov. of Ala. Is Indicted*, N.Y. Times, May 28, 2004	14

Cited Authorities

	Page
Bill Estep, *Judge: Coal Rights Trump Public Land*, Lexington Herald-Leader, Aug. 30, 2002	10
Bill Estep, *Money Owed Gable's Firm Is Doubled*, Lexington Herald-Leader, Sep. 11, 2003	10
David M. Halbfinger, *DiFrancesco Quits Bid for Gov., Stung by Scrutiny*, N.Y. Times, Apr. 26, 2001	14
http://www.kref.state.ky.us/krefsearch	10
http://www.opensecrets.org/indivs/index.asp	10
Glen Justice, *Irrelevance Stalks a Post-Watergate Invention*, N.Y. Times, Nov. 16, 2003, § 4	4
David Kocieniewski, *A Gov. Unindicted, But Implicated*, N.Y. Times, July 9, 2004	14
Ky. Officials Arrested, N.Y. Times, Mar. 15, 1986 ...	14
Daniel Hays Lowenstein, *On Campaign Finance Reform: the Root of All Evil Is Deeply Rooted*, 18 Hofstra L. Rev. 301 (1989)	13
Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784 (1985)	13

Cited Authorities

Page

Larry Sabato, *Real and Imagined Corruption in Campaign Financing, in Elections American Style* 155 (A. Reichley ed., 1987) 13

Marc Santora, *Conn. Panel Issues Findings on Rowland's Acts*, N.Y. Times, June 29, 2004 14

Kenneth N. Weine, *Triggering the First Amendment*, 24 J. Legis. 223 (1998) 4

Jodi Wilgoren, *Kerry Tends to Some Core Democratic Constituencies*, N.Y. Times, July 13, 2004 4

W.G. Wilkinson, 60, Ky. Gov. Who Faced Scandals (Obit.), N.Y. Times, July 6, 2002 14

The Blue Moon, vol. 11, no. 2 (Mar.-Apr. 2004), *available at* http://artscouncil.ky.gov/bmoon/marapr04/03.htm 10

Brief of Amici Curiae Committee for Economic Development, Warren E. Buffett, Edward A. Kangas, Jerome Kohlberg, Paul Volcker, and Sixteen Other Business Leaders, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674), *available at* 2003 WL 21841439 12

Brief for Amici Curiae Chamber of Comm. of the U.S. et al., *In re Hammond*, No. 04–0089 (Tex. 2004), *available at* 2004 WL 1237317 ... 17

Cited Authorities

Page

Opp. to Petition for Cert., *Leake v. N.C. Right to Life, Inc.*, No. 03–910 (Mar. 23, 2004) 17

Camp v. Schwarzenegger, No. 03AS05478, slip op. at 27–28 (Cal. Super. Ct. Sacramento County Jan. 27, 2003), *at* http://www.saccourt.com/geninfo/News_Media/Docs/Camp%20v.%20Schwarzenegger.PDF 12

Court Denies Ex-Gov. Pension, N.Y. Times, Mar. 27, 2004 14

FEC, FEC Announces 2000 Presidential Spending Limits, *at* http://www.fec.gov/press/press2000/preslimits2000.htm 4

BRIEF IN SUPPORT OF PETITIONERS

With the consent of the parties, *amici curiae* the Brennan Center for Justice at NYU School of Law, Common Cause of Kentucky, and the National Voting Rights Institute hereby submit their brief in support of Petitioners.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici Curiae are nonpartisan organizations that support effective campaign finance systems at the federal, state, and local levels, including systems containing provisions of the sort at issue in this case. More detailed statements of the interests of the *Amici* are attached in Appendix A to this brief.

SUMMARY OF ARGUMENT

Reading the circuit court's opinion was like seeing a ghost. Barely one month after this Court had interred the distinction between "express advocacy" and "issue advocacy"—a distinction the Court called "functionally meaningless"—the Sixth Circuit not only exhumed it but extended it to a context in which it had never been used. As the petition explains, the circuit court opened the door to vote buying and voter intimidation by limiting Kentucky's ban on "electioneering" at polling places to express advocacy. What gives the case exceptional importance is the threat that the same functionally meaningless construction will remain the default construction for *any* election-related law challenged as vague or overbroad. This Court should stop lower federal courts from routinely construing state laws into insignificance. *See* Point III.

---

1. Letters of consent have been filed with the Clerk of this Court. No party's counsel authored any part of this brief. No person or entity other than *Amici* contributed monetarily to preparing or submitting the brief.

The Sixth Circuit also sowed confusion by splitting from other circuits and state courts of last resort on two questions of national importance in the field of campaign finance. The first is the constitutionality of "trigger" provisions, which are critical to public finance systems in more than 20 States and localities. Almost all public finance systems ask candidates to accept spending limits in exchange for public funds. Triggers remove the voluntary spending cap, and in some jurisdictions provide additional public funds, if a nonparticipating candidate exceeds the cap. Triggers reassure candidates that if they agree to limit their own expenditures, they will not be grossly outspent by opponents who opt out. Without triggers, public finance systems can founder or even collapse, just as the federal matching-fund system for presidential primary elections appears to be doing. *See* Point I.

The second campaign finance issue on which the Sixth Circuit created a split of authority is the interplay between Kentucky's limit on candidates' lending to their own campaigns and its ban on post-election fundraising. These provisions prevent public officeholders from soliciting contributions that effectively go straight into their own pockets. Under the Sixth Circuit's decision, wealthy candidates can "lend" their campaigns unlimited sums and then, when in office, repay themselves by raising money from people seeking government contracts. This gambit skates very close to bribery. It certainly creates at least the appearance that a "pay to play" system is in effect. States have a compelling interest in preventing that appearance, let alone the reality. This Court should resolve the split of authority to make clear that States can introduce effective prophylactic measures to combat real and apparent corruption. *See* Point II.

ARGUMENT

I.

The Sixth Circuit's Decision Throws Campaign Finance Law Into Disarray.

A. The Opinion Below Threatens Public Finance Systems Around the Nation.

The Sixth Circuit's decision striking down Kentucky's trigger provision calls into question the laws of at least eleven other states and nine localities and could stymie reform of the federal presidential campaign finance system. A review of different jurisdictions' public finance systems reveals the variety of state and local policies that are threatened by the Sixth Circuit's opinion. Appendix B to this brief catalogs the systems of those states and localities.

Irrespective of the details, triggers are vital to public finance systems that use them. "[A] voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice." *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998). Though public finance systems vary from jurisdiction to jurisdiction, triggers serve the same function wherever they are used. In exchange for some form of public funding, candidates accept voluntary spending limits. Triggers assuage candidates' fear that if they agree to spending caps, opponents will opt out of the system and grossly outspend them. If triggers cannot be used, the very concept of public financing is in jeopardy.

The breakdown of the presidential primary funding system illustrates the problem. During the 2000 Republican primaries, then-Governor Bush chose not to accept matching funds, raising

and spending far more than the $40.5 million limit faced by other candidates. *See* FEC, FEC Announces 2000 Presidential Spending Limits, *at* http://www.fec.gov/press/press2000/preslimits2000.htm. By 2004, two leading Democratic candidates also opted out, fearing that they would otherwise be unable to compete with the $200 million that now-President Bush intended to amass and spend before his renomination in September. *See* Glen Justice, *Irrelevance Stalks a Post-Watergate Invention*, N.Y. Times, Nov. 16, 2003, § 4 at 3. Many even speculated that Senator Kerry, the presumptive Democratic nominee, would opt out of the full public funding system for the general election, believing he could raise more than the $75 million on offer from the government. Jodi Wilgoren, *Kerry Tends to Some Core Democratic Constituencies*, N.Y. Times, July 13, 2004, at A16. Unless the system is fixed, the consensus among political observers is that no serious candidate will again participate in the public finance system in the primaries, and 2004 may be the last year in which the candidates accept full public funding for the general election.

The Sixth Circuit's opinion implies that all systems that use triggers are unconstitutional. The decision casts doubt on existing triggers (outside circuits that have reached contrary holdings, as we explain below) and hinders attempts to fix systems that are in danger of becoming obsolete. *See* Kenneth N. Weine, *Triggering the First Amendment*, 24 J. Legis. 223, 236 (1998) ("[T]riggers are merely a modernization device for campaign finance systems."). Leading reformers in Congress have introduced a bill to correct several serious weaknesses in the federal system, including its lack of a trigger. *See* S. 1913, § 4(d), 108th Cong.; H.R. 3617, § 4(d), 108th Cong. If the Sixth Circuit is right, that bill is unconstitutional. Legislators often hesitate to support a bill while constitutional doubts remain. Despite widespread agreement that the current system is

unsustainable, failure to overturn the circuit court judgment implicitly condemning the bill could delay or preclude Congress's consideration of needed reforms.

The opinion below threatens both major classes of public finance systems: partial public funding by matching private contributions; and full public funding, also known as "clean money." Kentucky uses a matching system. Some matching systems match only part of each private contribution; the federal government, for example, matches only the first $250 contributed by each individual to a candidate in the presidential primaries. 26 U.S.C. § 9034(a). Systems also vary in the ratio of matching funds to contributions. The federal system provides a one-to-one match, in which a candidate who receives a $250 contribution also receives $250 of public money. *Id.* Kentucky's system matches contributions at a two-to-one ratio, so that a gubernatorial candidate must raise only $600,000 privately in order to reach the $1.8 million spending cap. Ky. Rev. Stat. § 121A.080(1). The highest ratio of which we know is New York City's four-to-one match. N.Y.C. Admin. Code § 3-705(2).

Other jurisdictions have adopted "clean money" systems offering full public funding. Candidates must solicit a certain number of nominal contributions, usually five or ten dollars, to ensure that public money is not claimed by frivolous candidacies lacking any popular support. Once a candidate has received the required number of contributions, the government funds the campaign up to the voluntary spending limit, and the candidate need not (indeed, is not permitted to) raise any more private money. *See Daggett v. Comm'n on Gov't al Ethics & Election Practices*, 205 F.3d 445, 451 (1st Cir. 2000) (describing Maine's clean money system). Clean money systems may be particularly attractive for judicial elections to protect judges from depending

on contributions from counsel or litigants who frequently appear before them. N.C. Gen. Stat. §§ 163-278.61 *et seq.*

There are other variations. The federal system, for instance, is a hybrid. A matching system is used during the primaries, but there is full public funding for the general election. *Compare* 26 U.S.C. § 9004 (full public funding) *with id.* at 9034 (matching funds in primary). Michigan uses a similar hybrid. Mich. Comp. Laws §§ 169.264, 169.265. In Nebraska's unique system, candidates who agree to the spending cap receive no public funds initially but are eligible for funds if a nonparticipating candidate estimates that he will exceed the cap. Neb. Rev. Stat. §§ 32-1604, 32-1606.

Like other aspects of public funding, triggers are structured differently according to each jurisdiction's needs and constraints. The first major variable is whether a trigger can be activated by third-party spending independent of any candidate's campaign, as in Arizona, or only by a nonparticipating candidate's spending or receipt of contributions, as in Kentucky. *Compare* Ariz. Rev. Stat. § 16-952 *with* Ky. Rev. Stat. § 121A.080(4). The next question is what happens when a trigger is activated. Most jurisdictions lift the cap on participating candidates, but not all systems provide additional public money. Kentucky does continue to match contributions once the cap has been lifted. Ky. Rev. Stat. § 121A.030. Most jurisdictions that provide additional public funds limit their financial exposure, enabling high-spending opponents or independent groups to outspend participating candidates in some cases. Maine, for example, will not give a participating candidate more than twice the voluntary spending cap, even if a nonparticipating candidate spends many times that amount; since Maine uses a clean-money system, participating candidates are barred from trying to make up the difference through private contributions. *See Daggett*, 205 F.3d at 451.

The Sixth Circuit decision that stands to chill both improvements in the federal system and further experimentation by states and localities is, moreover, inconsistent with decisions in the First and Eighth Circuits. Both of those courts—the only courts of appeals to have considered the question—upheld triggers. *Id.* at 445; *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). *Daggett* upheld a trigger as applied to both candidate and independent expenditures. The Eighth Circuit upheld a trigger as applied to expenditures by nonparticipating candidates (calling into question its prior rejection of a trigger as applied to independent expenditures, *see Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994)).

The Sixth Circuit's understanding of the First Amendment squarely conflicts with that of other circuits. The First Circuit concluded that triggers inflicted no constitutionally cognizable burden at all. "We cannot . . . equate[] responsive speech with an impairment to the initial speaker." *Daggett*, 205 F.3d at 465. The Sixth Circuit, on the other hand, thought triggers imposed such a burden as to amount to an unconstitutional "limit" on expenditures. *Anderson v. Spear*, 356 F.3d 651, 667 (6th Cir. 2004). This fundamental disagreement over the meaning of the First Amendment calls out for resolution.

B. Sixth Circuit Doctrine Confers Unprecedented and Unjustifiable Privileges on Self-Financed Candidates.

This Court might be tempted to resolve the circuit split by distinguishing this case from *Daggett* and *Rosenstiel*. But the giving legal effect to the distinction—as the panel apparently did in distinguishing an earlier Sixth Circuit decision—creates a problem even more serious than a split of authority. Thanks to the decision below, Sixth Circuit law protects expenditures by wealthy, self-financed candidates more stringently than it

protects identical expenditures by candidates who raise money from supporters. That perverse disparity has no support in this Court's jurisprudence, with good reason: it cannot be rooted in any plausible theory of the First Amendment.

The Sixth Circuit relied on *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), for its decision but misapprehended *Buckley*'s holding. In striking down FECA's limits on candidates' campaign expenditures, *Buckley* created no constitutional distinction between expenditures financed by a candidate's personal wealth and expenditures financed by contributions from others. The Court used the same reasoning to strike down both limitations on both types of expenditures and did so in the same section of the *Buckley* opinion. *Id.* at 51-54 (discussing expenditures from personal wealth); 54-59 (discussing overall spending by a campaign). Nothing in *Buckley* suggests that the constitutionality of a trigger activated by nonparticipating candidates' expenditures should turn on whether a candidate is spending personal wealth or money collected from contributors.

In the Sixth Circuit, however, that is precisely what the question turns on. A previous panel upheld Kentucky's trigger. *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998). The *Anderson* panel acknowledged that it was bound by *Gable*'s holding. *Anderson*, 356 F.3d at 676–77. The *Anderson* panel therefore struck down the trigger only as applied to self-financed candidates.

The panel reasoned as follows: The trigger is activated when a nonparticipating candidate accepts more than $1.8 million in contributions; the statute defines "contribution" to include a candidate's donation of money to his own campaign committee; the only reason for the committee to take the candidate's money is to spend it; therefore, the trigger limits expenditure of the candidate's own money. *Id.* at 667 ("Because Kentucky's

definition of contribution includes what are candidate expenditures, and because this definition is relied upon by other segments of the regulatory scheme to indirectly limit candidate expenditures, the statute infringes upon constitutionally protected speech.").[2]

The same reasoning would apply equally, however, to candidates' expenditure of money donated by others. Just as the only reason for a committee to accept money from the candidate is to spend it, the only reason for the committee to accept money from someone else is to spend it. If a trigger based on a candidate's contributions burdens expenditures, then a trigger based on contributions from others also burdens expenditures. *See Gable*, 142 F.3d at 947 ("The crux of [Gable's] claim is that the effect of the Trigger is to coerce him into limiting his campaign spending to $1.8 million, thereby forgoing protected speech."). If one is unconstitutional, so is the other—unless expenditure of candidates' own money receives more constitutional protection than expenditure of money collected from supporters.

The decision below conflicts with other circuits over whether triggers place constitutionally appreciable burdens on candidate expenditures in the first place. Worse, however, is the bizarre implication of the tension between *Anderson* and *Gable*. Imagine two candidates, each of whom has $1 million in his committee's bank account. One candidate wrote a check for $1 million on his personal account; the other raised $1 million from contributions subject to the jurisdiction's contribution limits. Any district court in the Sixth Circuit must conclude

2. The panel purported to strike down the statutory definition of "contribution." Anderson claimed that the trigger, by incorporating the definition, "deterred him from making expenditures." The opinion rejected this approach in favor of a "facial" analysis of the definition itself. *Anderson*, 356 F.3d at 667.

that the first candidate has a greater right to spend his $1 million without regulatory consequence than does the second candidate. The implications go far beyond trigger provisions. Any regulation that indirectly affects expenditures is subject to the Sixth Circuit's doctrine that self-financed candidates have more rights than contributor-financed candidates. The Court should repudiate that pernicious doctrine before it takes hold in other contexts.[3]

---

3. *Anderson*'s distinguishing of *Gable* is probably wrong even on its own terms, because *Gable* recognized that nonparticipating candidates' contributions to their own campaigns can activate the trigger. *See Gable*, 142 F.3d at 944 ("When a non-participating slate collects more than $1.8 million . . . including contributions from the candidates themselves, the Trigger is activated."). The *Gable* plaintiff, Robert Gable, was almost surely self-financed, at least in part, in his 1995 run for governor. During the 1994 and 1996 election cycles, Gable and his wife Emily gave more than $85,000 to federal candidates, PACs, and parties; it is scarcely conceivable that Gable gave nothing to his own campaign at the same time. *See* http://www.opensecrets.org/indivs/index.asp (searchable database of reported contributions). The Gables also gave $4000 to current Kentucky Governor Ernie Fletcher during his successful run in 2003. *See* http://www.kref.state.ky.us/krefsearch (Kentucky Registry of Finance database). Gable, who chaired the Kentucky Republican Party from 1986 to 1994, is heir to "an empire in coal and timber" who is active in business, politics, and philanthropy. *See* Bill Estep, *Judge: Coal Rights Trump Public Land*, Lexington Herald-Leader, Aug. 30, 2002, at A1; Bill Estep, *Money Owed Gable's Firm Is Doubled*, Lexington Herald-Leader, Sep. 11, 2003, at B1; *The Blue Moon*, vol. 11, no. 2 (Mar.-Apr. 2004), *available at* http://artscouncil.ky.gov/bmoon/marapr04/03.htm.

II.

Review Is Warranted to Protect States' Power to Prevent Public Officials from Demanding Gifts from People with Business before the Government.

The Sixth Circuit struck down two related provisions that the Commonwealth's legislature found essential to preventing corruption and the appearance of corruption. Kentucky law permits gubernatorial candidates to lend up to $50,000 to their campaigns (along with a completely unlimited amount of outright gifts). A separate provision prevents candidates from soliciting campaign contributions after the election. The Sixth Circuit struck down both restrictions. Under the regime the Sixth Circuit imposed on Kentucky's citizens, a candidate can spend as much as he wants on his campaign, call it a "loan" to his campaign committee, and then, after winning, extract contributions that permit the now insolvent committee to repay the loan. In that all-too-likely scenario, post-election contributions would effectively go straight into the elected official's pocket.

When public officials press state contractors to give them money for their own personal accounts, we call it extortion. When contractors voluntarily make gifts in the expectation of receiving state business, we call it bribery. If the Sixth Circuit opinion did not quite legalize extortion and bribery, it permitted elected officials to solicit money that citizens will reasonably perceive as bribes. The decision also makes it more difficult to prosecute genuine bribery by giving perpetrators a lawful pretext for corrupt payments.

Other states have apparently reached this conclusion, because they have also limited candidates' loans to their committees and banned post-election fundraising. Courts in those states, moreover, have upheld the rules. *See State v. Alaska*

Civil Liberties Union, 978 P.2d 597 (Alaska 1999); *Ferre v. State*, 478 So. 2d 1077 (Fla. Dist. Ct. App. 1985), *adopted*, 494 So. 2d 214 (Fla. 1986). *But see Opinion of the Justices*, 637 N.E.2d 213 (Mass. 1994) (advisory opinion holding that a ban on fundraising during non-election years would be unconstitutional).

In last year's recall election, then-candidate Arnold Schwarzenegger lent his campaign $4 million, apparently violating state law limiting such loans to $100,000. *See* Cal. Gov't Code § 85307(b). After the election, a California court enjoined now-Governor Schwarzenegger from soliciting post-election contributions to repay the loan to himself. *Camp v. Schwarzenegger*, No. 03AS05478, slip op. at 27–28 (Cal. Super. Ct. Sacramento County Jan. 27, 2003), *at* http://www.saccourt.com/geninfo/News_Media/Docs/Camp%20v.%20Schwarzenegger.PDF. Although California does not have a general ban on post-election contributions, the court noted the particular problems caused when such contributions are used to repay candidates' loans to their own campaigns. *See id.* at 18–19.

By overlooking those problems, the Sixth Circuit invited a "pay to play" system completely antithetical to the First Amendment: victims are pressed to contribute to politicians irrespective of whether they support those politicians and their policies. It is bad enough that such pressure can be brought to bear before an election. *See, e.g.*, Brief of Amici Curiae Committee for Economic Development, Warren E. Buffett, Edward A. Kangas, Jerome Kohlberg, Paul Volcker, and Sixteen Other Business Leaders at 6-15, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02–1674), *available at* 2003 WL 21841439 (discussing the pressure business leaders felt to give soft money before BCRA). After the election—just when any ideological or communicative function of contributions

virtually disappears—contributors' hope of receiving favorable governmental treatment dramatically increases. *See Alaska Civil Liberties Union*, 978 P.2d at 630 ("Post-election time limits, however, far more clearly address corruption and its appearance because the election has resolved the critical contingency of which candidate will hold office."); *Ferre*, 478 So. 2d at 1080 n.9 ("There is, however, a rational distinction between a bet and a bet on a sure thing.").

It is remarkable how dramatically contributors' allegiance can shift after Election Day. The winner of the 1982 Texas gubernatorial election received 90 post-election contributions, ranging from $10,000 to $50,000, from contributors who had given to his opponent before the election. Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 827 n.157 (1985). When Democrats unseated seven incumbent Republican senators in the 1986 midterm election, "'there were 150 instances in which a PAC gave to the GOP candidate before the election and then made a contribution to the victorious Democrat after the votes were counted.'" Daniel Hays Lowenstein, *On Campaign Finance Reform: the Root of All Evil Is Deeply Rooted*, 18 Hofstra L. Rev. 301, 312 (1989) (quoting Larry Sabato, *Real and Imagined Corruption in Campaign Financing, in Elections American Style* 155, 155 (A. Reichley ed., 1987)). The temptation to give and solicit corrupt contributions to a candidate's campaign committee is considerable in any case. But when the committee is a mere conduit to the candidate's own bank account, the temptation can only become stronger. *See United States v. Sun-Diamond Growers of Cal.*, 941 F. Supp. 1277, 1280 (D.D.C. 1996) (noting that post-election contributions can promote quid pro quo arrangements with candidates who run campaigns at a deficit) (quoting *FEC v. Lance*, 617 F.2d 365, 372 n.4 (5th Cir. 1980)).

Unfortunately, the fear that some candidates will succumb to temptation is not fanciful. At least seven governors have been convicted, indicted, or investigated for bribery in just the past four years.[4] Kentucky has suffered its share of corruption—including a federal investigation of a governor who used precisely the lend-now-collect-later approach endorsed by the Sixth Circuit (the governor's nephew went to prison for bribery, but the governor was not indicted).[5] The opinion is a blueprint for making bribes look legitimate.

The loan limit and the ban on post-election contributions work in tandem to combat corruption. The loan limit permits candidates to lend seed money to their campaigns while limiting their personal financial stake in donors' pre-election contributions. The ban on post-election fundraising prevents elected officials' from demanding contributions to pay off campaign debts to themselves. Neither law stops wealthy candidates from simply paying for their campaigns if they wish. Although each provision is useful on its own, the combination serves to prevent the worst examples of corruption.

---

4. *See, e.g.*, David Kocieniewski, *A Gov. Unindicted, But Implicated*, N.Y. Times, July 9, 2004, at B1; Marc Santora, *Conn. Panel Issues Findings on Rowland's Acts*, N.Y. Times, June 29, 2004, at B1; Shaila K. Dewan, *Former Gov. of Ala. Is Indicted*, N.Y. Times, May 28, 2004, at A15; *Court Denies Ex-Gov. Pension*, N.Y. Times, Mar. 27, 2004, at A9; Monica Davey, *Former Gov. Ryan of Ill. Is Indicted on Graft Charges*, N.Y. Times, Dec. 18, 2003, at A36; David M. Halbfinger, *DiFrancesco Quits Bid for Gov., Stung by Scrutiny*, N.Y. Times, Apr. 26, 2001, at A1; Rick Bragg, *Ex-Gov. of La. Gets 10 Years*, N.Y. Times, Jan. 9, 2001, at A12.

5. *See, e.g., W.G. Wilkinson, 60, Ky. Gov. Who Faced Scandals* (Obit.), N.Y. Times, July 6, 2002, at A14; B. Drummond Ayres Jr., *With Leaders Leaving Office for Jail, Ky. Works to Refurbish Image*, N.Y. Times, Sept. 19, 1993, at 26; *Ky. Officials Arrested*, N.Y. Times, Mar. 15, 1986, at 9.

III.

Federal Courts Should Not Construe State Laws to be "Functionally Meaningless."

For a quarter of a century, campaign finance law labored under lower courts' belief—since shown to be mistaken—that most expenditure-related regulation could apply only to "express advocacy." Almost all federal circuits further held that only so-called "magic words" could be regulated as express advocacy. *See Calif. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1097 (9th Cir. 2003) (collecting cases). States could prohibit corporations and unions from paying for campaign advertisements, for example, only if the advertisements included phrases like "Vote for Smith" or "Defeat Jones." It was child's play to avoid the magic words while still unmistakably urging voters to support or oppose a particular candidate. *See McConnell v. FEC*, 124 S. Ct. 619, 696 (2003).

Last Term, this Court clarified "that the express advocacy restriction is a product of statutory interpretation, not a constitutional command." *Id.* at 688. Indeed, the Court said, "*Buckley*'s magic-words requirement is functionally meaningless." *Id.* at 689. After *McConnell*, no one could mistake express advocacy for a substantive constitutional boundary.

The very next month, the Sixth Circuit not only revived the express advocacy restriction but applied it in a new context. The opinion below threatens to become the first in a line of post-*McConnell* decisions reinstating the express advocacy test as the default interpretation of any election-related statute that is claimed to be ambiguous. Briefs and articles are already citing *Anderson* for that very proposition. Since, as *McConnell* recognized, limiting a statute to express advocacy practically amounts to striking it down, this Court should correct the Sixth

Circuit's error before States are doomed to another quarter-century of hobbled regulation.

Petitioners have challenged two distinct holdings against the Kentucky statute that establishes buffer zones around polling places. The first might be called the geographical holding: a 500-foot radius, said the Sixth Circuit, is too large. We focus here on the second holding: irrespective of the size of the buffer zone, the only thing prohibited inside it is express advocacy, presumably of the magic-words variety.[6] That second holding, standing alone, eviscerates the statute. Even if the buffer zone covered the entire precinct, the Sixth Circuit's construction would permit a vote buyer to walk right up to the voting booth so long as he wore a T-shirt saying: "Tell Governor Green to stop raising our taxes."

That construction let the express advocacy genie back out of the bottle. As this case illustrates, imposing an express advocacy limitation as a "saving" construction can render a variety of statutes—not only those in the field of campaign finance—"functionally meaningless." The panel, however, viewed this crippling construction as the default interpretation. *See Anderson*, 356 F.3d at 664–65 (*McConnell* "left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth"). Opponents of campaign finance reform have already seized upon *Anderson* to press this approach. Two of the Nation's leading anti-reform advocates (counsel for Respondents in this case) argued that *Anderson*

---

6. We support Petitioners' request that the Court review both questions presented regarding the buffer-zone statute, although this brief addresses only the Sixth Circuit's imposition of a magic-words requirement.

supports routine use of the express advocacy test to resolve vagueness and overbreadth challenges:

> The test is a familiar, easily-applied constitutional adjudication tool with which the courts have become comfortable over the years as it has been woven into the fabric of the law for nearly three decades. It is a bright-line test that resolves vague statutes in a constitutionally defensible way. It is a reliable cure for vagueness and overbreadth. . . .

James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Still Not a Loophole: Examining* McConnell*'s Exception to* Buckley*'s General Rule Protecting Issue Advocacy*, 31 N. Ky. L. Rev. 289, 318 (2004). Similar arguments are appearing in briefs before this and other courts. *See, e.g.*, Brief for Amici Curiae Chamber of Comm. of the U.S. et al. at *11, *In re Hammond*, No. 04–0089 (Tex. 2004), *available at* 2004 WL 1237317 (claiming express advocacy is "how the statute must be limited in order to preserve it") (citing *Anderson*); Opp. to Petition for Cert., *Leake v. N.C. Right to Life, Inc.*, No. 03–910 (Mar. 23, 2004) (arguing that States have only "two choices for the regulation of campaign finance expenditures: . . . the express advocacy test, or . . . the functional equivalent of express advocacy through clearly defined requirements for timing, media, and audience") (citing *Anderson*).

Certiorari should be granted to clarify the continued vitality (if any) of the express advocacy concept. Certainly, statutes that had already been construed, before *McConnell*, as limited to express advocacy might continue to bear the same construction until amended. But *Anderson* reached out to impose that limitation not only upon a new statute, but upon text that differed from Kentucky's express-advocacy-only laws. *See, e.g.*, Ky. Rev. Stat. § 121A.010(13) ("'Independent expenditure' means the

expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate. . . ."). By contrast, the buffer-zone statute uses the same term—"electioneering"—Congress used in BCRA to go *beyond* express advocacy. The Commonwealth used what might be called express express advocacy language when it wanted to import the *Buckley* definition, but the Sixth Circuit ignored that fact in its rush to create an implied express advocacy provision.

The decision below thus raises important considerations of federalism and comity. Barely a month after this Court explained how porous the express advocacy definition is, the Sixth Circuit construed an important Kentucky law out of existence. The court did not even ask the Commonwealth for its views on how *McConnell* might affect the question, ruling without the benefit of any supplemental briefing or argument. This Court has long cautioned against federal courts' precipitate invalidation or construction of state laws. *See, e.g.*, *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

> Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court.

Arizonans for Official English v. Arizona, 520 U.S. 43, 79 (1997). If any court is to squeeze the statutory text into an express advocacy box, it should be the Supreme Court of Kentucky. *See Majors v. Abell*, 317 F.3d 719, 724 (7th Cir. 2003) (Posner, J.) ("A state court is bound to have a better idea of the elasticity of the state's statutes than a federal court would have.").

> Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court.

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 510 (1985) (O'Connor, J., concurring); *see also* Ky. R. Civ. P. 76.37 (permitting certification). The decision below created a vacuum in State law and failed to respect the authority of the Commonwealth of Kentucky and its citizens' interest in corruption-free government.

The court below affronted not only the Kentucky legislature that passed the buffer-zone statute and the Kentucky judiciary whose function it is to construe the statute, but also the Kentucky executive, which had already construed the statute in a different fashion. The panel apparently felt no need to respect Kentucky administrative agencies' interpretation of Commonwealth law; in another portion of the opinion, it derided the notion that such interpretations might receive the *Chevron* deference routinely accorded federal agencies' interpretations of federal law. *See Anderson*, 356 F.3d at 669. This Court, on the other hand, has said—in the context of a First Amendment overbreadth challenge like this one—that it will not ignore authoritative State executive-branch interpretations of State laws. *Broadrick v. Oklahoma*, 413 U.S. 601, 617–18 (1973); *see also Pharm. Research & Mfrs. of Amer. v. Concannon*, 249 F.3d 66, 75 (1st Cir. 2001); *Federal Trade Comm'n v. MTK Mktg., Inc.*, 149 F.3d 1036, 1039–40 (9th Cir. 1998) (citing *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). The panel should have recognized the expertise of the Kentucky Board of Elections in applying the buffer-zone statute, not

cursorily rejected the Board's construction. *See Anderson*, 356 F.3d at 665.

That is not to say that this case requires the Court to decide whether State administrative agencies are entitled to *Chevron* deference or whether the circuit court should have certified the statute's construction to the Kentucky Supreme Court. Rather, the ham-handed fashion in which the opinion effectively dismantled a State law simply underscores the threat it poses as the first appellate decision to address an issue of this nature since *McConnell*. The *Anderson* opinion, if allowed to stand, will be a model not merely for using express advocacy as a default construction in election-law cases, but for federal courts' imposing that construction on unwilling States.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully request that the Court grant the petition.

Respectfully submitted,

DEBORAH GOLDBERG
Counsel of Record
ADAM H. MORSE
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York NY 10013
(212) 998–6730

Counsel for Amici Curiae

APPENDIX

APPENDIX A

INTERESTS OF *AMICI*

The **Brennan Center for Justice at NYU School of Law** is a nonpartisan organization dedicated to a vision of inclusive and effective democracy. The Center was part of the legal team that successfully defended the Bipartisan Campaign Reform Act ("BCRA") in *McConnell v. FEC*, 124 S. Ct. 619 (2003), representing BCRA's congressional sponsors as defendants in the district court and respondents in this Court. The Center also successfully represented respondent Joan Bray in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000). The Center participated as *amicus curiae* in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), and *FEC v. Beaumont*, 539 U.S. 146 (2003).

Common Cause of Kentucky ("CC/KY") is a non-profit, non-partisan membership organization and a vehicle for citizens to take action holding their elected leaders accountable to the public interest. Common Cause was founded in 1970 and has more than 250,000 members nationally; approximately 1,000 of them are citizens of Kentucky. CC/KY participated as *amicus curiae* in *Gable v. Patton* and other campaign finance cases decided by the Sixth Circuit.

The **National Voting Rights Institute** ("NVRI") is a non-profit organization dedicated to protecting the constitutional right of all citizens, regardless of economic status, to equal and meaningful participation in every phase of electoral politics. NVRI litigates cases throughout the country defending the constitutionality of campaign finance reform measures, such as those at issue here, that protect the integrity of the electoral process and enhance meaningful political participation by all citizens.

APPENDIX B

States With A Trigger Provision				
States	**Type of Program** (i.e., how initial public funding is distributed)	**Triggering Event**	**Consequences of Trigger**	**Trigger Provision**
Arizona	Lump sum	The total of a candidate's fundraising or spending, plus independent expenditures, exceeds the original spending limit	Spending limit and public funding are readjusted to match opposition fundraising or spending, up to two times the original limit	Ariz. Rev. Stat. § 16-952
Florida	2 to 1 match for contributions up to $250	A nonparticipating candidate's spending exceeds the original spending limit	Spending limit is readjusted to level that nonparticipating candidate reaches; public funds, equal to the new limit (but not to exceed two times the original limit), are distributed to participating candidates	Fla. Stat. § 106.355
Maine	Lump sum	The total of a candidate's fundraising or spending, plus independent expenditures, exceeds the original spending limit	Spending limit and public funding are readjusted to match opposition fundraising or spending, up to two times the original limit	Me. Rev. Stat. tit. 21-A, § 1125(9)
Michigan	General Election: Lump sum; Primary Election: 2 to 1 match for contributions up to $100	Gubernatorial candidate receives contributions over $340,000	The spending cap is lifted for nonparticipating candidates, but limit on public funds remains the same	Mich. Comp. Laws § 169.269
Minnesota	Tax check off funds put into fund account and distributed based on statutory percentages	A nonparticipating candidate's fundraising or spending exceeds statutory percentages of the spending limit	The spending cap is lifted for nonparticipating candidates, and they remain eligible for public funds	Minn. Stat. § 10A.25 (Subd. 10)

Appendix B

States	Type of Program (i.e., how initial public funding is distributed)	Triggering Event	Consequences of Trigger	Trigger Provision
Nebraska	Lump sum; no public funds if all candidates agree to participate	The highest estimated maximum expenditure filed by any of the candidate's opponents is greater than the spending limits and the opponent spends 40% of their estimated total expenditure	The candidate is entitled to public funds in the amount of the difference between the spending limit and the highest estimated maximum expenditure filed by any of the candidate's opponents.	Neb. Rev. Stat. §§ 32-1601 and 32-1606
New Mexico	Lump sum	The total of a nonparticipating candidate's fundraising or spending, plus independent expenditures, exceeds the original spending limit	Spending limit and public funding are readjusted to match opposition fundraising or spending, up to two times the original limit	N.M. Stat. § 1-19A-14
North Carolina	Lump sum	The total of a candidate's fundraising or spending, plus independent expenditures, exceeds the maximum qualifying contributions amount in a primary election or the base level of funding available to participating candidates in the general election	Spending limit and public funding are readjusted to match opposition fundraising or spending, up to two times the original limit	N.C. Gen. Stat. §§ 163-278.62(18) and 163-278.67
Ohio	Not a public financing system	A candidate reports intent to use a certain amount of their personal wealth	Lifts contribution limits of opponent	Ohio Rev. Code § 3517.103(C), (D)
Rhode Island	2 to 1 match for contributions up to $500; 1 to 1 match for contributions over $500	A nonparticipating candidate's spending exceeds the original spending limit	Spending limit is readjusted to level that nonparticipating candidate reaches	R.I. Gen. Laws § 17-25-24

Appendix B

States	Type of Program (i.e., how initial public funding is distributed)	Triggering Event	Consequences of Trigger	Trigger Provision
Wisconsin	Lump sum	Presence in the general election of a nonparticipating candidate who received at least 6% of the total vote cast in the primary election	Spending cap and contribution limits are lifted for participating candidates in the general election	Wis. Stat. § 11.50 (2)(i)